# THE MILITARY JUSTICE SYSTEM

Subcourse Number MP1017

EDITION D

United States Army Military School

Fort Leonard Wood, Mo 65473

3 Credit Hours

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SUBCOURSE OVERVIEW

This subcourse was designed to teach the student a basic understanding of the policies and procedures of the Military Justice System.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In you own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE

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| Action: | Identify punitive and nonpunitive disciplinary measures; how to conduct a preliminary inquiry; administration of nonjudicial punishment; how to impose pretrial confinement/restriction; how to prefer court-martial charges; and how to testify. |
| Condition: | Use this subcourse. |
| Standard: | Demonstrate competency of this task by achieving a minimum score of 70 percent on |

the final subcourse examination..

REFERENCES : AR 27-10; AR 614-200; AR 380-67; AR 635-200; AR 601-280; AR 600-8-24; AR 190-47; AR 600-8-19.

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LESSON

# THE MILITARY JUSTICE SYSTEM

## OVERVIEW

LESSON DESCRIPTION:

In this lesson you will learn to identify punitive and nonpunitive disciplinary measures; how to conduct a preliminary inquiry into an offense; nonjudicial punishment administrations; pretrial confinement/restriction imposition; how to prefer court-martial charges; and how to testify.

TERMINAL LEARNING OBJECTIVE:

ACTION: Identify punitive and nonpunitive disciplinary measures; how to conduct a preliminary inquiry; administration of nonjudicial punishment, impose pretrial confinement/restriction; prefer court-martial charges; and how to testify.

CONDITION: You will have this subcourse.

STANDARD: You must obtain a score of at least 70 percent correct answers on the final examination for this subcourse.

REFERENCES: The material contained in this lesson was derived from the following publications: AR 27-10, UCMJ, AR 614-200, AR 380-67, AR 635-200, AR 601-280, AR 600-8-24, AR 190-47, AR 600-8-19.

# INTRODUCTION

The military is a unique society, with distinct needs in the areas of discipline and order. Many things that are simple matters of courtesy in the civilian world are considered issues of criminal law in the military. A civilian worker who fails to report for duty with a private employer or who is disrespectful toward his employer would not face the possibility of criminal prosecution and going to jail. In the military, it is different. As a military officer, warrant officer, or Noncommissioned Officer (NCO), you must understand the system in which you operate. The same is true for others who hold positions of responsibility in terms of administering and enforcing our criminal laws. While the military system of law is similar to the civilian system in many ways, there are numerous procedural and substantive differences.

The commander must be able to maintain obedience from subordinates, or the military will not be able to accomplish its mission. In the scheme of military justice, the commander is the key. He is the most important person in that system. Along with great responsibility comes great authority. The extent, and limits, of that authority will be examined in this subcourse.

The criminal investigator/law enforcement officer plays the critical role of uncovering crime and identifying the offender. The attorneys will prosecute and defend the accused at trial. The military judge, confinement officials, appellate courts, etc., all play vital roles in the functioning of our military justice system. The commander, however, is the central figure. He makes the critical decisions which determine when, how, and if the military justice system will respond in any given case.

The purposes of our military justice system are stated in paragraph three of the Preamble to the Manual for Courts-Martial (1984): "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." The system is designed to assist the commander in promoting and encouraging a cohesive, well-trained unit. It is not simply aimed at punishment and retribution, but has a positive goal of promoting good order and discipline. It is intended to educate and correct minor offenders through nonpunitive, administrative actions and nonjudicial punishment. Where these efforts fail or where the misconduct is of sufficient severity, the commander may utilize a more severe response, such as separation from the service or trial by court-martial.

Discipline, then, is essential to the functioning of the military. The military justice system is essential to the maintenance of that discipline. Without it, the commander could not effectively exercise his authority or accomplish the mission.

# PART A - THE COMMANDER--THE KEY TO THE SYSTEM

1. The commander has many resources available to him in dealing with disciplining, correcting, and educating his Soldiers. Those who fail to meet the standards required of them must be corrected. As was noted, the purpose of military discipline is not simply to punish, but is also to correct. The commander's various tools range from the very mild to the very harsh. The commander must always remember that not every individual who makes a mistake needs to be treated as a hardened criminal. A Soldier who shows up 2 minutes late to a morning formation is guilty of a crime. This does not mean, however, that such a person automatically should be court-martialed or sent to jail. Lesser means may be used by the commander to get this Soldier's attention and guide him toward the right behavior. An overly harsh response from the commander may ruin what might have been a long and honorable military career. Alternatives to a court-martial may avoid unnecessarily stigmatizing a Soldier's career and may also avoid an unnecessary expenditure of time, manpower, and money.

2. As the commander's response to a Soldier's misconduct becomes progressively more severe, it also becomes increasingly more complicated. While it may be fairly simple to counsel the errant Soldier, preferring court-martial charges involves something much more complex. A commander who elects to try each and every offender by court-martial will quickly find himself expending all of his time and resources in doing so. He will, in effect, be spending 95 percent of his time on about 5 percent of his Soldiers (if even that many). Courts-martial are certainly necessary in many cases. Sometimes a lesser form of discipline would be totally inadequate to deal with an offender. A Soldier's prior record of misconduct, or the severity of his single act of misconduct, may rule out all but the most severe form of discipline. In such a case, a court-martial may be the only realistic and sensible option. The point to remember is that there are numerous tools available to a commander in dealing with a Soldier's misconduct. These range from the relatively minor to the extremely severe. The exact form that is chosen in any given case will involve the careful exercise of the commander's discretion. In deciding what to do, the commander conducts what is called a "preliminary inquiry" (Rules for Courts-Martial [RCM] 303). This is an informal fact-gathering process that considers such factors as the nature of the misconduct and the Soldier's past disciplinary record.

3. The options available to the commander can be separated into those that are nonpunitive and those that are punitive. Nonpunitive measures are made up of a variety of administrative actions that may be taken. Article 15s and courts-martial are considered punitive, and are reserved for cases where a more severe response is required. The overall philosophy of the military justice system is to utilize the lowest level of action that is appropriate under the circumstances of each case (considering both the offense committed and the record of the individual offender). It is the commander who is called upon to make the determination as to which form to utilize.

4. Although the commander is the key, the role of the NCO is also extremely important. His input into the determination of proper discipline will frequently include recommendations to the commander regarding the type, duration, and limits of punishment to be imposed. This is especially true in the imposition of punitive discipline, i.e., Article 15s and courts-martial. In the area of nonpunitive discipline, the NCO may play more than an advisory role. In this situation, he may actually impose the discipline upon the offender, such as by counseling him (orally or in writing).

## PART B - Understanding the Parties—Staff Judge Advocate

1. Those who work in the area of military justice must understand the role that is fulfilled by the various people who work within that system. Critical to this understanding is a familiarity with the attorneys who work in the local Staff Judge Advocate (SJA) office. The successful functioning of a military justice system will inevitably demand frequent contact with the attorneys in this office. The following is a break-down of the organization of a typical SJA office. In any given situation, depending on the resources that are available, one or more of the roles listed may be fulfilled by a single attorney. In other words, the trial counsel could also function as the claims officer.

a. Staff judge advocate. The SJA attorney is responsible for the overall running of the office. He works for the commander of the installation and is a member of his personal staff, generally an officer in the grade of 05 or 06. He renders legal advice to the command, and is responsible for the overall provision of legal services on-post. He, like the other military attorneys in the office, is a member of the Judge Advocate General's Corps (JAGC).

b. Deputy Staff Judge Advocate (DSJA). This is the second in command of the office, the main assistant to the SJA. He will be responsible for running the office in the SJA's absence.

c. Military justice section. The chief of this section is responsible for the work done by the various trial counsel, who are the prosecutors at courts-martial. He may also prosecute cases himself. He runs the military justice section for the SJA and supervises the other attorneys who represent the government at courts-martial. There may be more than one trial counsel, depending on the size of the installation. The trial counsel also advise the various commanders regarding a wide variety of military justice matters, and coordinate cases with the Criminal Investigations Department (CID), Military Police Investigations (MPI), etc. Additionally, they appear as the prosecutor in the United States (U.S.) Magistrate's Court (minor offenses committed on the installation).

d. Defense counsel. This office is responsible for representing the Soldier at trial. The U.S. Army has an independent Trial Defense Service (TDS), wherein the defense counsel do not work directly for the SJA, or even for the post commander, but are under an independent rating scheme. They receive administrative assistance from the SJA office. The defense counsel will also advise the Soldier regarding his rights when faced with other forms of adverse administrative actions; i.e., bar to reenlistment, letter of reprimand, etc. Depending on the size of the installation, this section may consist of more than one attorney. If so, the person in charge of the office is called the Senior Defense Counsel (SDC).

e. Claims section. This section handles individual claims against the government, such as those resulting from PCS moves. Personnel from this section may become involved in the military justice section by testifying as expert witnesses in cases involving fraud or false claims.

f. Legal assistance. This section helps individual members of the armed forces with their personal legal problems (divorce, separation, annulment, creditor complaints, wills, power of attorney, child support, alimony, etc.). At most installations, the attorney performs an advisory role and assists with the preparation of various legal forms and court documents, but does not appear in court on behalf of the individual.

g. Adminstrative law section. This section reviews and interprets regualtions, statutes, and other laws on various issues of civil law (environmental law, labor law, the Privacy Act, etc.). It also reviews government contracts for legal suffiency. Criminal cases involving civilian employees of the Department of the Army (DA) are referred to this section for disposition. Administrative actions taken against Soldiers (letters of reprimand, bars to reeenlistment, separation from the service, etc.) are also referred to this section for hadling. The attorneys in this section will also represent the government at trials before various administrative agencies, such as the Equal Employment Opportunity Commission, the Merit Systems Protection Board etc.

h. Military judge. This is a Judge Advocate General (JAG) attorney who presides at courts-martial. Like TDS, he works for an independent chain of command and is not rated by personnel in the SJA office.

i. Military magistrate. This is a JAG attorney who is responsible for the issuance of search authorizations and the review of pretrial confinement. This attorney is not associated with either the prosecution or defense of criminal actions and, thus, is a neutral and detached authority. Most installations have a military magistrate on-call 24 hours a day.

2. You should coordinate cases with the appropriate JAG officer. In the area of military justice, this will involve such issues as search and seizure, confessions, jurisdictional issues, pretrial line-up procedures, etc. Criminal cases involving civilian employees should be coordinated with the administrative law section. This is also true for those who are contemplating the taking of adverse administrative action against a Soldier. Issues involving the release of information outside of DA should also be referred to this section. Law enforcement officers who intend to list an individual as a suspect in an investigation, or who need to found/unfound a case should coordinate with the military justice section. This involves such questions as what crime(s) to charge and who to charge. Many crimes, of course, involve a complicated web of multiple offenders. This is also true when they intend to dispose of evidence in a case. Most SJA offices have an attorney on-call 24-hours a day. When questions arise, call that office for assistance.

## PART C - NONPUNITIVE MEASURES AVAILABLE TO THE COMMANDER

1. Administrative sanctions. As we noted earlier, the commander has available to him many options for disposing of cases of misconduct on the part of his Soldiers. The nonpunitive options emphasize correction and not punishment. They should be considered on a scale that runs from those of relatively low severity to those of increasing seriousness.

a. Counseling. This is the most basic technique used by supervisors at all levels. It can be formal or informal, written or oral. Its purpose is to point out to the individual the area in which he has failed to perform adequately, and to direct him toward an acceptable level of performance. It is generally used for those who show up late for work, sleep in class, appear in a sloppy uniform, or commit other such infractions. It aims to correct, not simply to punish. It is the mildest form of action the commander may take, next only to the option of doing nothing. If this technique is combined with positive counseling of the good Soldier and those who improve in response to negative counseling, it can be an extremely effective tool in motivating improved performance.

b. Admonitions and reprimands. Like counseling, these may be oral or written. They are aimed more directly at misconduct, but are still designed to correct an individual's behavior. As such they are "corrective management tools." U.S. v. Williams, 27 Military Justice (MJ) 529 (Army Court of Military Review [ACMR] 1988). The goal is to point out very clearly to the individual just what his misconduct was, why it was wrong, and why it cannot be repeated. It is normally used for more serious misconduct than the counseling statement, such as where the offense was deliberately involved, or was the second incident. As an example, a person's ineptitude or failure to learn might be addressed through counseling. If the failure is willful, or due to misconduct, an admonition or reprimand might be appropriate.

(1) A reprimand chastises past performance, whereas an admonition is a warning to prevent its recurrence in the future. The two are usually combined in a single letter. An informal reprimand or admonition is really the same as a counseling statement. A formal letter of reprimand, however, can have an extremely serious impact on a Soldier's career. Such a letter may be filed in the individual's military personnel file, either at the local level, or at DA. Obviously, this may adversely impact on promotion opportunities, high-level schooling, etc.

(2) Informal reprimands may be given by any supervisor. A formal letter of reprimand, however, must be administered in accordance with regulatory requirements. AR 600-37 contains procedural safeguards designed to prevent the filing of unsubstantiated allegations in a Soldier's personnel file. Only certain persons may issue such a letter (commander, general officer, etc.). Also, a letter may not be filed at DA level unless so directed by a general officer.

(3) It should be observed that admonitions and reprimands may also be imposed as a form of punishment under Article 15, Uniform Code of Military Justice (UCMJ), or at a court-martial. Such a situation, however, would not be considered "nonpunitive," and would be governed by other provisions of the law, to be discussed later.

c. Corrective training. Additional training may sometimes be the best remedy for a Soldier's deficient performance. This is a tool that monitors the performance of subordinates, corrects their mistakes, and provides guidance for future performance. It is intended to be CORRECTIVE and is not designed as a form of punishment. It is, therefore, best suited to deal with those deficiencies that are correctable through extra training. Consequently, the training must be related to the initial deficiency. A Soldier who fails a Physical Training (PT) test may be required to take extra PT, outside regular duty hours, until he can pass the test. A Soldier who fails to qualify with his Ml6 weapon may be given additional marksmanship practice. A Soldier who has a messy area in the barracks may be required to prepare for and undergo additional inspections and/or drills. A Soldier who appears in improper uniform may be required to attend special instruction in its proper wear. In all of these cases, the additional instruction or training is related to the Soldier's deficiency.

A Soldier who fails to qualify with his Ml6 weapon, however, should not be required to take a 10 - mile march in order to teach him a lesson. Here, the extra "training" is really a punishment, and is not reasonably related to the deficiency that is supposedly being corrected. If that is the case, the "corrective training" is impermissible. U.S. v. Hoover, 24 MJ 874 (ACMR 1987). As you can see, the proper use of corrective training requires planning and careful thought on the part of the supervisor. It should be noted that extra duty which is imposed as a punishment under Article 15 or the sentence of a court-martial is not a form of corrective punishment. It is a punishment. The two are separate

concepts. Corrective training should not be imposed as a subterfuge for what is, in reality, simply punishment.

d. Withholding privileges. Soldiers are permitted to do many things that the military considers to be privileges (although the Soldier may consider them something more). This includes such things as using the Post Exchange (PX), driving on-post, using the various morale support activities (craft shop, recreation center, etc.), and writing checks. Any one of these privileges may be withdrawn for the proper reason. As an example, driving while intoxicated on-post may result in the loss of one's on-post driving privilege. Shoplifting at the PX may result in the loss of one's PX shopping privilege. Bouncing a check at the PX may result in the loss of the privilege of writing checks on-post. One who repeatedly arrives for work late may even lose the privilege of living off of the installation.

(1) Since these sanctions may be of considerable severity, they are strictly regulated. The withdrawal of PX privileges is subject to appeal, as is the revocation of on-post driving privileges. Action taken must be in accordance with regulatory guidelines, and must be taken by the appropriate commander. As an example, the revocation of on-post driving privileges may be done by the installation commander, but not by the company commander.

(2) As is the case with corrective training, the use of this measure must be reasonably related to the Soldier's misconduct. There must be a significant relationship between the privilege withheld and the offense committed. Stated another way, there must be a reasonable comparability in importance and duration between the privilege withheld, the offense committed, and the desired correction. As an example, a Soldier who oversleeps and arrives late to formation may not lose his PX privileges. A Soldier who bounces a check at the NCO club should not be denied the privilege of driving on the installation. In such a case, the loss of privilege would have no reasonable relationship to the misconduct.

e. Military Occupation Specialty (MOS) reclassification. A Soldier's MOS is subject to withdrawal as a result of disciplinary action taken under the UCMJ "if such action adversely affects the Soldier's eligibility to perform duty in the MOS (AR 614-200, Para 3-18). The MOS may be withdrawn for "demonstrated inefficient performance of duty in the technical, supervisory, or other requirements of the MOS." Where a Soldier is unable to properly perform his duties, it may be appropriate to change the nature of those duties, by virtue of withdrawing his MOS. In the case of a Military Police (MP) officer, for example, and the sensitivity of this position in the eye of the public, misconduct, which might not affect an average Soldier's ability to perform his MOS, may still justify the withdrawal of the MP MOS. Such an individual may be found to be unfit for MP duties and responsibilities. This is a serious measure to take, in view of the tremendous effect it has upon the Soldier's career. As a result, the Soldier has due process rights available to him, with which he can fight the commander's recommendation.

f. Efficiency reports. This can be a very severe form of nonpunitive discipline. The report must be factual, of course, but may still address deficiencies in performance. An individual who fails to meet minimum standards (PT, weight, etc.) may expect to have this reflected in the report. Other deficiencies (sloppiness, lack of attention to detail, etc.) can similarly be addressed in the report. Since the EER or OER report can have such a drastic effect upon the Soldier's career, it should not be used unless lesser means of motivating improvement have been tried without success. Because of its tremendous adverse effect, the Soldier is given the right to appeal a report, which is considered to be "adverse."

g. Revocation of security clearance. This is somewhat similar to an MOS reclassification. In fact, the loss of a security clearance may lead to a subsequent revocation of the Soldier's MOS (AR 380-67, paragraph 2-200). Again, this is a measure that the commander may recommend, but which is carried out by a higher authority (as is the case with an MOS reclassification). It is appropriate in a case where the Soldier's misconduct raises a serious question as to whether he should have access to classified materials. This includes matters for which the Soldier might be blackmailed, and such misconduct as drug and alcohol abuse. The person who holds a security clearance must be reliable and trustworthy. Conduct may warrant revocation when it shows that the Soldier lacks one of those qualities, or both of them. The Soldier has the right to know the basis for the commander's recommendation, and to refute or explain any adverse matters.

h. Bar to reenlistment. The ability to stay in the Army is not a right. If a Soldier's performance is not satisfactory, he is not guaranteed an opportunity to reenlist and keep his job. Where the Soldier fails to meet Army standards, the unit commander may recommend that the individual be barred from reenlistment. If approved by the higher commander, the bar is filed in the Soldier's personnel file. So long as it stays in effect, the individual may not reenlist. The commander must review the bar every 3 months, and 30 days prior to the Soldier's Permanent Change of Station (PCS) or End Term of Service (ETS). The commander may remove the bar at any time if he feels that the individual has sufficiently improved his performance.

A proposed bar is referred to the Soldier, who has the right to submit a response or any other evidence on his behalf. This may include his witness statements, documentary evidence, etc. The Soldier is given 15 days in which to put together his evidence. The specific procedures for imposing such a bar are at AR 601-280, Chapter 8.

i. Administrative reduction. This is a very serious form of nonpunitive administrative action. The basis for this is usually inefficiency, which is defined as the demonstration by a Soldier "of distinctive characteristics which reflect his inability to perform his duties and responsibilities of his grade and

MOS" (AR 600-8-19, paragraph 7-5). More specifically, it may also include "any act or course of conduct affirmatively evidencing that the enlisted member concerned . . . lacks those abilities and qualities required and expected of a person of that grade and experience" (AR 600-8-19, paragraph 7-5). Acts of misconduct may also be considered as bearing upon the Soldier's inefficiency. Reduction may also result from the misconduct itself, which can be reflected in various forms (Article 15s, court-martial conviction[s], conviction by civilian court[s]), or adjudication as a juvenile offender by a civil court).

The authority to reduce is generally vested in the commander who has the authority to promote to that grade (AR 600-8-19, paragraph 1-9). Since this is so drastic a measure, a Soldier is given various regulatory protections. As an example, board action is required for Soldiers in pay grade E5 and above. Others are notified of the basis for the action and may submit a written rebuttal. They may also appeal the action to higher authority.

j. Administrative elimination. This amounts to firing the Soldier from his job and terminating his military career. There are several different grounds upon which such action may be taken. Since this is so serious an action, the Soldier will enjoy various due process rights, depending on the exact type of separation action being taken, and his length of service. Before initiating any one of these actions, it is best to always consult with the JAG.

(1) Entry-level separation (AR 635-200, Chapter 11). This applies to the Soldier who has completed no more than 180 days of active duty by the date of separation. It is used to separate Soldiers who demonstrate unsatisfactory performance and/or minor disciplinary infractions early in their careers. In other words, the Soldier is simply deemed not qualified for retention. The grounds for this are that (1) the Soldier cannot or will not adapt socially or emotionally to military life; (2) he cannot meet the minimum standards prescribed for successful completion of training, due to the lack of aptitude, ability, motivation, or self-discipline; or (3) he has demonstrated character and behavior characteristics that are incompatible with satisfactory continued service. In this, as is the case with the other separation actions to be discussed, the unit commander would recommend the elimination action, but would refer it to higher authority for final action.

(2) Alcohol and drug rehabilitation failure (AR 635-200, Chapter 9). This covers the Soldier who is deemed to be a "rehabilitative failure-due to his failure or refusal to successfully participate in or complete an alcohol and drug abuse prevention and control program. In these cases, the commander must demonstrate that further rehabilitative efforts are not practical, a determination that is made in consultation with the rehabilitative team.

(3) Unsatisfactory performance (AR 635-200, Chapter 13). A Soldier may be separated when the commander feels that the individual will not develop sufficiently to participate satisfactorily in further training and/or become a satisfactory Soldier. It also applies where the seriousness of the circumstances is such that retention of the Soldier "would have an adverse impact on military discipline, good order, and morale" and it is likely that the Soldier "will be a disruptive influence in present or future assignments" and it is likely that the circumstances will continue to recur and the ability of the Soldier to perform duties effectively in the future, including his potential for advancement or leadership, is unlikely (AR 635-200, paragraph 13-2).

(4) Misconduct (AR 635-200, Chapter 14). Individuals may be separated when it is clearly established that: (1) despite attempts to rehabilitate or develop them as satisfactory Soldiers, further such effort is unlikely to succeed; or (2) rehabilitation is impracticable or the Soldier is not amenable to rehabilitation. This overall standard is applied to three broad categories of misconduct: (1) minor disciplinary infractions; (2) a pattern of misconduct consisting of discreditable involvement with civil or military authorities, or conduct prejudicial to good order and discipline; and (3) commission of a serious offense (AR 635-200, paragraph 14-12). It is also used to separate Soldiers who have been convicted of serious offenses by a civilian court (AR 635-200, paragraph 14-5).

(5) A Soldier who is separated under one of the above provisions may receive an honorable discharge, a general discharge under honorable conditions, or an other than honorable discharge. This will depend on the facts of the case, and the basis for the action (Chapter 9, Chapter 13, Chapter 14, etc.). The standards for the different types of discharges are at AR 635-200, paragraph 3-7. Since this action completely terminates the Soldier's military career, it must comply with certain due process standards. Certain actions require the use of a board procedure, where the Soldier has a right to appear before a board of officers. Other actions use what is called a notice procedure, whereby there is no such board. This is governed by either the length of the Soldier's career (prior service, for example), or by the basis for the action. The specific rules are in AR 635-200, Chapter 2.

k. Procedures for the separation of officers are in AR 600-8-24. One basis for such a removal is substandard performance of duty. Another is "moral or professional dereliction or interests of national security." Examples of this are discreditable, intentional failure to meet personal financial obligations, intentional omission or misstatement of fact in official statements or records (for the purpose of misrepresentation), conduct unbecoming an officer, intentional neglect of or failure to perform duties, and acts of personal misconduct (AR 600-8-24). The procedures for separation are set out in chapter 2 of that regulation. Again, due to the severity of the sanction, the officer is given various due process rights. Specific procedures governing boards of inquiry are set forth beginning in chapter 4 of the regulation.

# PART D - NONJUDICIAL PUNISHMENT

1. Punishment under Article 15, UCMJ, is considered to be a more powerful tool for correcting minor misbehavior. This procedure is directed at criminal misconduct that violates the punitive articles of the UCMJ. It is not, therefore, to be viewed as simply a corrective measure. It is punishment, intended to prevent future misconduct. It is a punitive tool that is available to the commander. Note, however, that it is a command tool. Article 15 procedures cannot be imposed by others (squad leader, platoon sergeant, etc.).

2. When to use. Commanders should use lesser administrative remedies (nonpunitive) to the fullest extent possible before resorting to the use of Article 15 procedures. Before using an Article 15, the commander should determine that the other lesser measures are inadequate. This involves an evaluation of both the background of the offender and the severity of the misconduct. The Soldier's record may demonstrate a pattern of misbehavior, showing that lesser forms of discipline have been (or will be) ineffective. If the Soldier has been repeatedly counseled regarding his misconduct, the repetition of his offense indicates that a sterner response is required.

a. The goal here is to deal with the offense at the lowest level that is appropriate for the offender, as well as for the offense that he has committed. Some forms of misconduct are so serious that even an Article 15 is an inadequate response. The commander, remember, is responsible for the maintenance of good order and discipline. To carry out this duty, he must be able to evaluate all of the facts in making the necessary determination. Nonjudicial punishment must be considered on an individual, case-by-case basis.

b. There are three basic reasons for the use of an Article 15. The first is to correct, educate, and reform offenders who cannot (or will not) benefit from less stringent measures. The second is to preserve a Soldier's record from the unnecessary stigma of a court-martial conviction. The third is to further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial (AR 27-10, paragraph 3-2).

3. Exercise of command authority. As was noted, imposing an Article 15 involves the exercise of a commander's personal judgment. He must determine whether an Article 15 is even appropriate for the case. If so, he must then determine the Soldier's guilt and assess an appropriate punishment. A superior commander may not, therefore, direct that a subordinate impose a particular punishment in any specific case, or even set forth predetermined kinds or amounts of punishment. To do so would constitute an improper form of command influence (AR 27-10, paragraph 3-4). A superior does, however, have the right to reserve to himself the right to exercise Article 15 jurisdiction over a specific case, or category of cases (AR 27-10, paragraph 3-4). As an example, the post commander may want

all cases of misconduct involving officers or senior NCOs forwarded to him for disposition. This is termed a withdrawal of jurisdiction. Also, a subordinate company grade commander may forward a case to a higher field grade commander if he feels his authority is insufficient to impose the appropriate punishment in a given case. As we will see shortly, there are both company and field grade Article 15s.

a. An Article 15 may be imposed by a commander. This is defined as "a commissioned or warrant officer who, by virtue of his or her grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command" (AR 27-10, paragraph 3-7a). In general terms, a command is a separate unit, in that the commander is the individual who is looked to by higher authority for the maintenance of order and discipline within the unit. A company is a command, but an infantry platoon within that company is not. The authority to administer an Article 15 is an attribute to command. Thus, the first sergeant or platoon sergeant may not impose nonjudicial punishment, although they may recommend that the commander himself do so. The ultimate decision remains that of the commander.

b. Since an Article 15 involves an exercise of the commander's personal discretion, the delegation of this power is very limited. A commander authorized to exercise General Court-Martial (GCM) jurisdiction, or any commanding general, may delegate this power "to one commissioned officer actually exercising the function of deputy or assistant commander" (AR 27-10, paragraph 3-7b). The delegate must be senior in rank to the person being punished, and must be given this power in writing.

c. The commander's authority to impose an Article 15 extends to every member of the command, officer and enlisted, unless that authority has been withheld by a higher commander. This includes those who are attached to the unit. In such cases of attachment, look at the language of the Soldier's orders. They will frequently state "attached for UCMJ purposes" or "attached for administration." Where the attachment orders are unclear, look to all of the surrounding circumstances (AR 27-10, paragraph 3-8). The issue is whether the individual is a member of the command. In other words, is he assigned to the organization? Is he affiliated therewith under circumstances indicating that the commander is to exercise authority over him? Does the individual have a duty to obey the commander's orders? Has the commander assumed some responsibility for the individual's welfare?

d. It is common practice for higher commanders to withhold the authority of a subordinate commander to impose Article 15 punishment on a certain category of offenders. As we explained earlier, the installation commander may want to personally handle all cases involving officers, warrant officers, and NCOs. The senior commander has a right to do this, and it is not a form of unlawful command influence. As was explained, this is simply a withdrawal of the lower commander's jurisdiction. What is prohibited is where the superior commander attempts to instruct the subordinate regarding when to impose an Article 15, and with what severity. When the subordinate commander still has the

jurisdiction to exercise his Article 15 authority, his decisions must reflect the personal exercise of his discretion.

4. Minor offenses. Article 15s are used to punish those who have committed a minor offense. This term does not include offenses that, if tried by a GCM, could be punished by a Dishonorable Discharge or confinement for more than a year. This simply means that the more serious crimes are usually not handled by an Article 15, and are tried by court-martial. This general rule is not inflexible, however, as the circumstances may make an Article 15 appropriate even though the offense does not qualify as "minor." In other words, the commander has the right to use his Article 15 power in disposing of major offenses as well. Cases involving the violations of, or the failure to obey lawful general orders and regulations may be handled by Article 15s "if the prohibited conduct itself is of a minor nature" (Article 27-10, paragraph 3-9). All of the surrounding circumstances must be evaluated in determining when an offense is to be considered for Article 15 punishment. Although an Article 15 is intended to be used in disposing of the more minor offenses, it may legally be used to deal with the more severe offenses. This is, again, a determination that the commander will make. The Soldier's prior record, the punishment authorized by the UCMJ for the offense, the degree of criminality involved, and the circumstances surrounding the commission of the offense are all relevant factors to consider. Certain crimes are simply so serious by their nature that they would not even be seriously considered for disposition under Article 15 (rape, robbery, murder, etc.). It is important to again emphasize that this is an area where the commander must carefully exercise his discretion.

a. If a Soldier has been given an Article 15 for a minor offense, this will bar a subsequent trial by court-martial for the same offense. If the offense is major, the Soldier could still be later court-martialed for the same offense. This is not considered to be a double jeopardy problem, since an Article 15 proceeding is not a trial. It is instead, an "administrative proceeding." Using both procedures for one offense is not normally done, in the absence of unusual circumstances. If it did occur, the Soldier could show the fact that he had already been punished as a matter in mitigation at his court-martial. Using both procedures will entail a greater expenditure of resources. Also, it may create an appearance of unfairness, which could undermine good order, discipline, and morale. Commanders who administer Article 15s must always do so "in an absolutely fair and judicious manner" (AR 27-10, paragraph 3-13).

b. If several offenses arise out of substantially one transaction or incident, they are to be handled together. They are not to be disposed of through multiple Article 15s. A Soldier who gets into a fight and damages government property in the process should not be given two separate Article 15s. He should, instead, be given one that charges both offenses together.

5. The commander's inquiry: The first step. As was noted, there are both company grade and field grade Article 15s. The higher level commander can impose a more severe punishment. Also, there are

both informal and formal procedures that can be used in administering an Article 15. These will be examined in more detail shortly. The commander must decide which option to use. Should he use an Article 15 at all? Would it be better to simply counsel the Soldier? Should he be barred from reenlisting instead? Is an Article 15 too lenient? Is a court-martial appropriate? The commander who does not have the necessary facts will find it very difficult to make these essential judgments. Before taking or recommending action, then, the commander must have the facts. Remember, he must conduct a preliminary inquiry.

a. The matter at issue must be properly and promptly investigated. The investigation should cover several things: (1) Was an offense committed? (2) Did this particular Soldier commit it? If not, who did? (3) What is the character and military record of the accused? The investigation by the commander may be quite informal, and may consist largely of reading the MPI and CID report, along with attached witness statements. Once the commander has a clear picture of just what happened, he must determine whether there is sufficient evidence to prove that the crime was committed. If not, taking disciplinary action will be unwarranted. Prior coordination with JAG is very important here. Assuming that the offense can be proven and that there is jurisdiction over the offender, the commander may now decide what level of action to take.

b. The commander's options, again, range from taking no action to recommending trial by GCM. The commander may elect some combination of nonpunitive measures. He may counsel the Soldier, bar him from reenlistment, and initiate a separation action. In other words, the various administrative measures may be combined with one another. The administrative measures may also be combined with the punitive ones. A Soldier may be given a counseling statement, barred from reenlistment, and may also be given an Article 15. At the same time, he may face the loss of his MOS and security clearance. The commander must be careful, however, not to overburden his administrative staff. He may, for example, legally recommend trial by court-martial and initiate a separation action at the same time. He should select discipline with careful consideration, however, since one form of sanction may cancel out the other. He may, without careful thought, simply produce a needless stream of paperwork. As an example, he may legally pursue both a separation action and a trial by court-martial. Pursuing both at the same time will consume a lot of resources that he might not be able to afford. The commander must consider the time and effort that go into the various disciplinary tools that are available to him.

c. The point is that the commander needs the facts. Once he has them, he can use them to arrive at a proper form of discipline. Without the facts, his decisions are likely to be ill-founded and illogical. If the evidence does not prove the commission of a crime, for example, the attempt to use Article 15 procedures could simply result in an embarrassment to the commander.

6. Summarized procedure. A company or field grade commander may elect to use either an informal, (summarized) procedure, or the formal one. Usually the informal (summarized) procedure is imposed

at the company level. This is because the maximum punishment here is the same at both company and field grade. The summarized procedure may only be used when an offense was committed by an enlisted member. Punishment may not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand or admonition (or a combination of these). The procedures are recorded on DA Form 2627-1, a copy of which is at AR 27-10, Figure 3-1. The procedures are also set forth at paragraph 3-16 of that regulation. If the offender is other than enlisted, or if a more substantial punishment is felt to be necessary (assuming, of course, that the offender is found guilty), the summarized procedure would not be used. In that case, the formal procedure would be used instead (AR 27-10, paragraph 3-17).

a. Under the summarized procedure, the Soldier has certain rights that must be respected, and the commander must notify the Soldier accordingly. The commander may also authorize a commissioned officer, warrant officer, or NCO to inform the Soldier of his rights, so long as this person is senior to the Soldier who is being notified. This individual should ordinarily be the unit first sergeant or the senior NCO of the command concerned. The Soldier is to be informed of the following:

(1) The imposing commander's intent to initiate proceedings under Article 15, UCMJ.

(2) The fact that the imposing commander intends to use summarized proceedings, and the maximum punishments imposable under those proceedings.

(3) The right to remain silent.

(4) The offense(s) that the member has allegedly committed, and the Article(s) of the UCMJ allegedly violated.

(5) The right to demand trial by court-martial. The Soldier, then, can refuse to have the case disposed of under Article 15 procedures. Note that there is an exception to this for persons who are "attached to or embarked in a vessel." Such persons cannot refuse an Article 15 and demand trial by court-martial (AR 27-10, paragraph 3-18d).

(6) The right to confront witnesses, examine evidence, and submit evidence in his defense, extenuation, and mitigation.

(7) The right to appeal.

b. The Soldier is then given the opportunity to either accept the Article 15, or to request a "reasonable time, normally 24 hours, to decide whether to demand trial by court-martial and to gather matters in defense, extenuation, and/or mitigation" (AR 27-10, paragraph 3-16c). Due to the limited punishments that may be imposed under the summarized procedure, the Soldier has no right to consult with counsel. Unless the Soldier actually demands trial by court-martial within the decision period, the imposing commander may proceed with the hearing. If the Soldier refuses to make any decision, the commander may continue with the Article 15. The hearing consists of the following:

(1) Consideration of evidence, oral or written, against the Soldier.

(2) Examination of available evidence by the Soldier.

(3) Presentation by the Soldier of matters in defense, extenuation, and mitigation.

(4) Determination of guilt or innocence by the imposing commander.

(5) Imposition of punishment or termination of the proceedings. If the Soldier is found not guilty after the presentation of evidence, of course, the proceedings will be terminated. No punishment will be imposed unless the Soldier has been found guilty.

(6) Explanation of the right to appeal.

c. The appeal and the decision on the appeal are recorded on DA Form 2627-1. The Soldier will be given a "reasonable time (normally no more than 5 calendar days) within which to submit an appeal" (AR 27-10, paragraph 3-16e). An appeal that is untimely may be rejected (paragraph 2-29a). If an appeal is made, it is forwarded through the imposing commander to the next superior commander. The Soldier may attach documents to the appeal (exhibits, witness statements, his statement, etc.). The Soldier is not required to state a specific reason for his appeal, but may do so to clarify what he is complaining of. There are, however, two basic reasons for an appeal: (1) based on the evidence, the Soldier still does not feel he is guilty; and (2) the punishment imposed was excessive (too harsh) (AR 27-10, paragraph 3-31).

d. The imposing commander may first act on the appeal, which may satisfy the Soldier. If not, the appeal is forwarded to the higher commander. The higher authority may grant the appeal in whole or in part, or deny it. He may reduce the punishment, but may not increase it. On appeal, the commander

who receives the appeal should carefully consider the reasons set forth in the appeal (if there were any stated). Is the Soldier guilty of the offense? Was the punishment excessive? On appeal, the punishment may also be suspended, which amounts to putting the Soldier on probation. Further misconduct occurring during the period of suspension may result in the vacation of the suspension (AR 27-10, paragraph 3-24). The imposing commander also initially has the power to suspend all or part of a punishment.

e. The DA Form 2627-1 is maintained in the unit personnel files. It is destroyed at the end of 2 years from the date of imposition of punishment, or on the Soldier's transfer from the unit, whichever occurs first (AR 27-10, paragraph 3-16f). In a subsequent trial by court-martial (should the Soldier later commit another offense), records of summarized Article 15 procedures are not admissible on sentencing (AR 27-10, paragraph 5-29).

f. The main advantage of the summarized procedure is its simplicity. For the Soldier, the main advantage is that it limits the punishment that may be imposed. He cannot be fined and cannot be reduced in rank. If the commander desires to have these options open to him in the event of a conviction, then he would not want to utilize the summarized procedure.

g. Figure 1-1 is a copy of DA 2627-1. You should read it and see how it reflects the procedures we just discussed. Also, compare it to the formal procedure (DA Form 2627) figure 1-2. Note the similarities (and differences) between the two procedures.

**SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ**

For use of this form, see AR 27-10; the proponent agency is TJAG.

*See Notes on Reverse Before Completing Form*

This form will be used only in cases involving enlisted personnel and then *ONLY* when no punishment *OTHER THAN* oral admonition or reprimand, restriction for 14 days or less, extra duties for 14 days or less, or a combination thereof has been imposed. [1]

| NAME | GRADE | SSN | UNIT |
|---|---|---|---|
| HABE, ALFRED H. | E-3 | 111-11-1111 | A Btry, 9/10th FA, 13th Inf Div, Fort Blank, VA 00000 |

1. On 23 June 2005, the above service member was advised that I was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct: [2]

On or about 0900 hours, 21 June 2005, you were absent without authority from A Btry, 9/10th FA, 13th Inf Div, located at Fort Blank, VA and remained so absent until on or about 0800 hours, 22 June 2005, in violation of Article 86, UCMJ.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial [3], the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed: [4]

Oral reprimand and restriction for 14 days.

3. The member was advised of the right to appeal to the Cdr, 9/10th FA, 13th Inf Div within 5 calendar days, that an appeal made after that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated above. The member:

[AHH] Elected immediately not to appeal [ ] Requested time to decide whether to appeal and the decision is indicated in item 4, below. [5] [6]

| DATE | NAME, GRADE, AND ORGANIZATION OF IMPOSING COMMANDER | SIGNATURE |
|---|---|---|
| 23 June 2005 | RICHARD J. MOAD, CPT, A BTRY, 9/10TH FA, 13TH INF DIV | Richard J. Moad |

4. *(Initial appropriate block, date, and sign)*

a. [AHH] I do not appeal b. [ ] I appeal and do not submit matters for consideration [7] c. [ ] I appeal and submit additional matters [7]

| DATE | NAME AND GRADE OF SERVICE MEMBER | SIGNATURE |
|---|---|---|
| 23 June 2005 | ALFRED H. HABE, E-3 | Alfred H. Habe |

5. After consideration of all matters presented in appeal, the appeal is:

[ ] Denied [ ] Granted as follows: [8]

| DATE | NAME, GRADE, AND ORGANIZATION OF COMMANDER | SIGNATURE |
|---|---|---|
| | | |

| 6. I have seen the action taken on my appeal. | DATE | SIGNATURE OF SERVICE MEMBER |
|---|---|---|
| | | |

7. ALLIED DOCUMENTS AND/OR COMMENTS [9] [10] [11]

DA FORM 2627-1, AUG 84 EDITION OF NOV 82 IS OBSOLETE USAPPC V1.00

Figure 1-1. DA Form 2627-1, Summarized Record of Proceedings Under Article 15, UCMJ (Front)

**RECORD OF SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ**

For use of this form, see AR 27-10; the proponent agency is The Judge Advocate General.

| NAME AND GRADE | SSN | UNIT |
|---|---|---|
| AGER, Robert L. | 000-10-0000 | D Co, 1/5 Inf, Fort Blank, VA 00000 |

TYPE OF SUPPLEMENTARY ACTION *(OTHER THAN BY SUPERIOR AUTHORITY ACTING ON APPEAL)* (Check appropriate box)

[ ] SUSPENSION (Complete item 1 below) [ ] MITIGATION (Complete item 2 below) [ ] REMISSION (Complete item 3 below)
[ ] SETTING ASIDE (Complete item 4 below) [X] VACATION OF SUSPENSION (Complete item 5 below)

**1. SUSPENSION**

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) suspended and will automatically be remitted if not vacated before _____.
*(date of punishment)* *(date)*

**2. MITIGATION**

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) mitigated to _____
*(date of punishment)*

**3. REMISSION**

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) remitted.
*(date of punishment)*

**4. SETTING ASIDE**

The punishment(s) of _____

imposed on the above service member on _____ (is) (are) set aside on the basis that _____
*(date of punishment)*

All rights, privileges, and property affected are hereby restored.

**5. VACATION OF SUSPENSION**

a. The suspension of the punishment(s) of reduction to Private First Class (E3)

imposed on the above service member on 23 Sep 05 (is) ~~(are)~~ hereby vacated. The unexecuted portion~~(s)~~ of the punishment~~(s)~~ will be duly executed.
*(date of punishment)*

b. Vacation is based on the following offense(s): In that you did, on or about 0600 hours, 1 Oct 05, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, D Co, 1/5 Inf, in front ob Building 15. This is in violation of Article 86, UCMJ.

c. The member *(was)* *(was~~not~~)* given an opportunity to rebut *(para 3-25, AR 27-10)*.
d. The member *(was)* *(was~~not~~)* present at the vacation proceeding *(para 3-25, AR 27-10)*.

ORIGINAL DA FORM 2627 *(Check appropriate box)*

[redacted] [redacted] [redacted]

**AUTHENTICATION** *(Check appropriate boxes)*

[X] BY MY ORDER [X] THE OFFICER WHO IMPOSED THE PUNISHMENT
[ ] THE SUCCESSOR IN COMMAND TO THE IMPOSING COMMANDER [ ] AS SUPERIOR AUTHORITY

| DATE | NAME, GRADE, AND ORGANIZATION OF COMMANDER | SIGNATURE |
|---|---|---|
| 2 Oct 05 | JAMES A. SMITH, CPT, Co D, 1/5 Inf | James A Smith |

DA FORM 2627-2, FEB 83 EDITION OF NOV 82 WILL BE USED UNTIL EXHAUSTED. USAPPC V1.00 ORIGINAL

Figure 1-1 (Continued). DA Form 2627-2 (Back)

**RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ**

For use of this form, see AR 27-10; the proponent agency is TJAG.

*See Notes on Reverse Before Completing Form*

| NAME | GRADE | SSN | UNIT | PAY (Basic & Sea/Foreign) |
|---|---|---|---|---|
| AGER, Robert L. | E4 | 000-10-0000 | D Co, 1/5 Inf, Ft Blank, VA 00000 | 1,695.60 |

1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct: 1/
In that you did, on or about 0600 hours, 21 Sep 05, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, D Co, 1/5 Inf, in front of building 15. This is in violation of Article 86, UCMJ.

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all *(matters of defense)* or why punishment should be very light *(matters of extenuation and mitigation)*. I will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. 2/ If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. 3/ In deciding what you want to do you have the right to consult with legal counsel located at Room 7, Building 10, Fort Blank, VA. You now have 48 hours to decide what you want to do. 4/

| DATE | NAME, GRADE, AND ORGANIZATION OF COMMANDER | SIGNATURE |
|---|---|---|
| 21 Sep 05<br>TIME 0800 | JAMES A. SMITH, CPT, D Co, 1/5 Inf | James A. Smith |

3. Having been afforded the opportunity to consult with counsel, my decisions are as follow: *(Initial appropriate blocks, date, and sign)*
a. [ ] I demand trial by court-martial.
b. [RLA] I do not demand trial by court-martial and in the Article 15 proceedings:
(1) I request the hearing be [RLA] Open [ ] Closed. (2) A person to speak in my behalf [ ] Is [RLA] Is not requested.
(3) Matters in defense, mitigation, and/or extenuation: [ ] Are not presented [RLA] Will be presented in person [ ] Are attached.

| DATE | NAME AND GRADE OF SERVICE MEMBER | SIGNATURE |
|---|---|---|
| 23 Sep 05 | ROBERT L. AGER, SPC | Robert L. Ager |

4. In a(n) [JAS] Open [ ] Closed hearing 5/ all matters presented in defense, mitigation, and/or extenuation, having been considered, the following punishment is imposed: 5/ 6/
Reduction to the grade of Private First Class, (E3), suspended, to be automatically remitted if not vacated before 23 Jan 06; and forfeiture of $100.00 pay.

[NOTE: Refer to Para 3-37b(1) prior to completing item 5]

5. [illegible] 7/
6. You are advised of your right to appeal to the _____ within 5 calendar days. An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated above.

| DATE | NAME, GRADE, AND ORGANIZATION OF COMMANDER | SIGNATURE |
|---|---|---|
| 23 Sep 05 | JAMES A. SMITH, CPT, D Co, 1/5 Inf | James A. Smith |

7. *(Initial appropriate block, date, and sign)*
a. [ ] I do not appeal b. [RLA] I appeal and do not submit additional matters 8/ 9/ c. [ ] I appeal and submit additional matters 8/ 9/

| DATE | NAME AND GRADE OF SERVICE MEMBER | SIGNATURE |
|---|---|---|
| 23 Sep 05 | ROBERT L. AGER, SPC | Robert L. Ager |

8. I have considered the appeal and it is my opinion that: The proceedings were conducted in accordance with law and regulation and the punishments imposed were not unjust nor disproportionate to the offense committed.

| DATE | NAME AND GRADE OF JUDGE ADVOCATE | SIGNATURE |
|---|---|---|
| 27 Sep 05 | LEWIS H. RANE, MAJ | Lewis H. Rane |

9. After consideration of all matters presented in appeal, the appeal is:
[Rgd] Denied [ ] Granted as follows: 10/

| DATE | NAME, GRADE, AND ORGANIZATION OF COMMANDER | SIGNATURE |
|---|---|---|
| 30 SEP 05 | LYMAN Z. LIPE, LTC, 1/5 INF | Lyman Z. Lipe |

| 10. I have seen the action taken on my appeal. | DATE | SIGNATURE OF SERVICE MEMBER |
|---|---|---|
| | 30 Sep 05 | Robert L. Ager |

11. ALLIED DOCUMENTS AND/OR COMMENTS 11/ 12/ 13/
"Paragraph 3-18(f)(1), AR 27-10 complied with."

statement by SFC Jones, dated 22 Sep 05

DA FORM 2627, AUG 84 — EDITION OF NOV 82 IS OBSOLETE — ORIGINAL

Figure 1-2. DA Form 2627

7. Formal procedure. The formal procedure for both company and field grade Article 15s is the same. The difference lies in the severity of the punishment that can be imposed. The field grade commander can impose more severe punishment than a company commander. Under both, the commander or his designated representative must inform the Soldier of his rights (AR 27-10, paragraph 3-18). The commander will inform the Soldier of the following:

a. That the commander intends to dispose of the matter under Article 15.

b. The maximum punishment that may be imposed under the Article 15 proceedings.

c. The right to remain silent. Specifically, the Soldier is told that he is not required to make any statement regarding the offense or offenses of which he is suspected, and that any statement he does make may be used against him in the Article 15 proceeding, or in any other proceeding (including a trial by court-martial).

d. The right to examine available evidence.

e. The right to counsel. This involves both an explanation of the right itself, and notice of the location of counsel. Counsel is defined as a judge advocate, DA civilian attorney, or another attorney who is acting under the supervision of either the U.S. Army TDS or a staff or command judge advocate (AR 27-10, paragraph 3-18c). The Soldier is entitled to a reasonable time in which to consult with counsel, which is normally 48 hours.

f. The right to demand trial by court-martial. There is, again, an exception for persons who are attached to or embarked in a vessel (AR 27-10, paragraph 3-18d). Otherwise, the Soldier has a right to refuse the Article 15 and demand trial by court-martial. The Soldier is to be told that if he makes such a demand, trial could be by Summary Court-Martial (SCM), Special Court-Martial (SPCM), or GCM. The Soldier will also be told that he can object to trial by SCM, and that at a SPCM or GCM, he is entitled to representation by qualified military counsel or civilian counsel. The civilian counsel is obtained at no expense to the government however (AR 27-10, paragraph 3-18d).

(1) If trial by court-martial is demanded, the Article 15 proceeding terminates. At that point, the commander must decide whether or not he wishes to go ahead and prefer court-martial charges. The fact that a court-martial has been demanded does not mean that one is necessarily going to occur. The commander may still dispose of the case through nonpunitive administrative measures (AR 27-10, paragraph 3-18[f]3). Also, the commander has the option of simply dropping the matter at this point.

(2) Again, unless the Soldier actually demands trial by court-martial, the commander may continue with the Article 15 proceeding. This is also the case where the Soldier refuses to make any decision, or will not sign the DA Form 2627 (AR 27-10, paragraph 3-18[f]4).

g. The right to call witnesses and present evidence. Witnesses are limited to those whom the commander determines are reasonably available. Neither witness nor transportation fees are authorized. A reasonably available witness "will ordinarily include only personnel at the installation concerned and others whose attendance will not unnecessarily delay the proceedings" (AR 27-10, paragraph 3-18i). As for evidence, formal rules are not applied. The commander may consider any matter, including un-sworn statements that he reasonably believes to be relevant (AR 27-10, paragraph 3-18j).

h. The right to fully present his case in the presence of the imposing commander. There is a very limited exception where this is made impossible by extraordinary circumstances (AR 27-10, paragraph 3-18[g]1). Before relying on this provision, consult with the JAG.

i. The right to a spokesman. This person may accompany the Soldier to the Article 15 proceeding, and need not be a lawyer. A Soldier does not have a right to the appointment of counsel to actually represent him at the Article 15 hearing. He may, however, bring one at his own expense, but this is rarely done. He could hire his attorney to act as a spokesman but, again, this is not normally the case because of the cost factor. The spokesman's presence is voluntary on his part, and no travel costs may be incurred at the expense of the government. If the person selected as the spokesman does not want to act as such, he cannot be forced to do so. The accused will simply have to find another spokesman.

An Article 15 hearing is not a trial. The commander is in charge of the proceedings. Different commanders will run the hearing in different ways. Neither the Soldier nor his spokesman has a right to personally cross-examine witnesses, unless the commander allows them to do so (AR 27-10, paragraph 3-18h). The accused may not convert the proceedings into an adversary-like trial.

j. The right to request an open or closed hearing. An open hearing is one that is open to the public, although it may still take place in the commander's office (AR 27-10, paragraph 3-18[g]2). Normally, Article 15 hearings are open, but the Soldier has the right to request an open or closed hearing.

If the Soldier is found guilty, the commander decides whether to impose any punishment and, if so, how much. The commander is encouraged to consult with his NCOs on the type, duration, and limits of punishment. Also, the NCOs are very often in the best position to observe a Soldier who is undergoing punishment, and their views on clemency should be given careful consideration (AR 27-10, paragraph 3-19a).

8. Formal procedure-limits on punishment. The precise limits on the punishment that may be imposed are set out in Article 15, UCMJ. A company grade Article 15 is one administered by a company grade

commander (Captain/03, lLT/02, or 2LT/01). A field grade Article 15 is simply one that is administered by a field grade commander (Major/04 or higher) (AR 27-10, table 3-1).

a. The maximum punishment for a company grade Article 15 may not exceed:

(1) Fourteen days restriction and/or extra duty.

(2 Seven days correctional custody.

(3) Forfeiture of seven days basic pay.

(4) One grade reduction (if E4 and below).

b. The maximum punishment for a field grade Article 15 consists of the same basic categories of punishment, but the severity is increased:

(1) Sixty days restriction.

(2) Forty-five days extra duty.

(3) Thirty days correctional custody.

(4) Forfeiture of half of 1 month's basic pay for 2 months.

(5) Reduction of one or more grades if E4 or below. If above E4, reduction of one grade, if within the commander's promotion authority.

c. Depending on the facts of a case, a commander may elect to impose no punishment at all. If some punishment is deemed warranted, the milder form would consist of a reprimand or admonition. Other, more severe punishments involve restrictions on a Soldier's liberty and the loss of pay and/or rank.

9. Types of punishment.

a. Arrest in quarters. This applies to commissioned or warrant officers, who are ordered to remain in quarters. It may be imposed only by a general officer in command (including general or flag rank), or by a GCM convening authority (AR 27-10, paragraph 3-19[b]4).

b. Correctional custody. This may be imposed by any commander, but only against those in pay grade E3 and below. There must, of course, be an adequate facility available, in accordance with (IAW) the standards in AR 190-47. Time spent in such custody is not time lost. During normal duty hours, the Soldier may work or train with his unit. Confinement on bread and water or diminished rations may also be imposed, but only on one who is E3 and below, and who is also attached to or embarked on a vessel (AR 27-10, paragraph 3-19[b]2).

c. Extra duty. The commander may require this to be performed at any time, and for any length. It may not, however, constitute cruel and unusual punishment. It also may not be required to be performed in a ridiculous or unnecessarily degrading manner, may not constitute a health or safety hazard, and may not "demean the member's position as an NCO or specialist" (AR 27-10, paragraph 3-19[b]5).

d. Restriction. This is a common form of punishment, which directs the Soldier to remain within a certain specified area, such as the company or battalion area. It is frequently combined with extra duty (AR 27-10, paragraph 3-19[b]3).

e. Deprivation of pay. The above punishments all have one major thing in common: they constitute deprivation of liberty. A Soldier may also face the loss of pay. A forfeiture means just what it says, namely the permanent loss of entitlement to pay. If a forfeiture is imposed in addition to a suspended or unsuspended reduction in grade, the amount forfeited will be limited to the amount authorized for the reduced grade. The maximum forfeiture to which a Soldier is subject during a given month is half of his basic pay per month. This is important in a situation where the Soldier may receive more than one Article 15 during that period (AR 27-10, paragraph 3-19[b]7).

f. Loss of rank. This is another, more severe, form of punishment. An enlisted Soldier may be reduced by a commander who has the authority to promote to the grade reduced from. AR 600-8-19 sets forth the authority of various commanders to promote. As an example, a company, troop, or battery commander may promote to grades E4 and below. A field grade commander of any organization which is authorized a commander in the grade of 05 or higher may promote assigned personnel to grades E5 and E6 (AR 600-8-19, paragraph 3-1).

The Soldier's new rank (if the reduction is unsuspended) is as of the date punishment of reduction was imposed. If the reduction is suspended, the date of rank held prior to the imposition of this punishment remains unchanged. If the reduction is suspended, and the suspension is later vacated, the date of the Soldier's new, reduced rank is the date the punishment was originally imposed (AR 27-10, paragraph 3-19[b][6]c).

10. Combination of punishments. The various types of punishments fall into three broad categories: deprivation of liberty, of pay, and of rank. The various forms of punishment may be combined in a given case. The Soldier may, for example, be given both a deprivation of pay AND a deprivation/reduction in rank. The power is not, however, without limit. The general rule is that no two or more punishments involving deprivation of liberty may be combined, to run either concurrently or consecutively. A frequently used exception to this general rule is that extra duty and restriction may be combined. In any event, however, the length may not exceed that allowable for the extra duty AR 27-10, paragraph 3-19[b]8). If a Soldier is already undergoing punishment for an Article 15 and gets another one (for a separate, subsequent offense), additional punishment involving a further deprivation of liberty may be imposed. The Soldier would begin serving it after completion of the earlier punishment (AR 27-10, paragraph 3-21c). Also, remember that there are limits on the total amount of forfeiture that may be taken during any given month.

11. Clemency. The imposing commander has the power to suspend part, or even all of the punishment that he has imposed. In effect, this puts the Soldier on probation (AR 27-10, paragraph 3-23). This may be done at the time punishment is imposed, or later. The commander who acts on an appeal also has this power. If the Soldier commits further misconduct during the probationary period, the suspension may be vacated. When this occurs, the punishment originally imposed would be served by the Soldier. The procedures applicable to such a vacation of suspended punishment are at AR 27-10, paragraph 3-25. The procedure does not follow formal rules of evidence. The commander may consider any matters that he reasonably feels are relevant. The action is recorded on the DA Form 2627-1 or DA Form 2627 (depending on whether an informal or formal Article 15 procedure was originally used). If the suspended punishment was of a certain kind (that set out in Article 15[e][1]-[7]) of the UCMJ, the Soldier should be given an opportunity to personally appear before the commander in a vacation proceeding. At this time, he may rebut the information on which the proposed vacation is being based. Examples of such punishment are extra duty or restriction for more than 14 days, reduction of one or more grades from E4 or above, and forfeiture of more than 7 days basic pay. You should consult Article 15 for the specific procedure to be followed, and refer the matter to JAG for legal advice. Where other punishments are involved, the Soldier will be informed of the basis for the proposed vacation, and should be given an opportunity to respond, orally or in writing. A Soldier has no formal right to appeal a vacation of the suspension.

12. Appeals. Any appeal must be timely. As a general rule, if it is submitted more than 5 calendar days after punishment was imposed, it is untimely (AR 27-10, paragraph 3-29a). The appellate procedures are the same as those used with the informal procedure (previously discussed). Article 15(e), UCMJ, requires SJA review on appeals from certain punishments. These are the same ones just discussed in (k) above. Even when such SJA referral is not required, it is always a good idea to consult that office with reference to any of these actions.

Punishments (unsuspended) of reduction and forfeiture take effect on the date imposed. Others take effect "on the date they are imposed, unless the imposing commander prescribes otherwise" (AR 27-10, paragraph 3-21b). An appeal should be decided within 5 calendar days (3 if summarized procedures were used). If the appeal is not decided within this period, and if the Soldier so requests, the performance of punishments involving deprivation of liberty will be interrupted or stopped, pending a decision on the appeal.

13. Disposition. An Article 15 is not considered to be a criminal conviction. If properly administered, however, the record of formal proceedings will be admissible at a subsequent court-martial sentencing proceeding. It will be used as a record of the Soldier's prior misconduct, which may result in the imposition of a more severe sentence (AR 27-10, paragraph 5-29). The imposing commander decides whether the original DA Form 2627 will be filed in the performance fiche or the restricted fiche of the Soldier's Official Military Personnel File (OMPF). The performance fiche is that portion of the file normally seen by DA selection boards in the determination of promotions, advanced schooling opportunities, etc. Thus, a filing here will clearly have a major impact on the Soldier's future, since these boards select on the best qualified basis. The imposing commander "should consider the Soldier's age, grade, total service (with particular attention to the Soldier's recent performance and past misconduct) and the fact that the filing decision is not subject to direct appeal. A filing in the performance fiche is appropriate when the Soldier's misconduct reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character or substantial breach of military discipline" (AR 27-10, paragraph 3-37b). Such a filing is not, however, automatically the end of a Soldier's career. A promotion board considering a promotion to E7 will not eliminate the individual from consideration simply because he received an Article 15 when he was an E3. Obviously, however, a more recent Article 15 would be something else. If the Article 15 is filed in the restricted fiche, the selection board would not normally see it. This will, therefore, result in a far lesser potential for damage to the Soldier's career.

a. Under a recent regulatory change, "Soldiers E4 and below will have the Article 15 'filed locally.'" It will be destroyed "at the end of 2 years from the date of imposition of punishment or on the Soldier's transfer to another General Court-Martial Convening Authority (GCMCA), 'whichever occurs first'" (AR 27-10, paragraph 3-37b).

b. Specific instructions for filing are at AR 27-10, paragraph 3-37. Commissioned and warrant officers and NCOs (E6 and above) may request the transfer of a record of nonjudicial punishment from the performance fiche of their OMPF to the restricted fiche. This is done by submitting a request for such action to the DA Suitability Evaluation Board (AR 27-10, paragraph 3-43).

c. As was explained previously, the record for an informal Article 15 proceeding is not admissible at a subsequent court-martial sentencing proceeding. The record of a formal Article 15 proceeding, however, will be admissible to show the Soldier's prior record of misconduct. This is a relevant issue in the determination of what is a fair and appropriate sentence, and can result in the imposition of a more severe sentence. Also, the record of any nonjudicial punishment (formal or informal) may be used to support other nonpunitive disciplinary measures (bar to reenlistment, administrative reduction, separation from the service, etc.).

## PART E THE COURT-MARTIAL SYSTEM

1. For those Soldiers who are not amenable to correction by the nonpunitive or nonjudicial methods of correction or discipline, the military has a system of judicial punishment. It is a criminal court system, utilized in punishing and correcting those offenders who either commit repeat offenses, or who have committed serious offenses that cannot be dealt with through lesser means. For the most serious crimes, this system can put a person in prison for life, and may even put him to death. Before exploring the mechanics of this system and the different components and stages of a court-martial trial, we will first look at some basic definitions.

a. Court-martial. This is a military criminal court or tribunal. It is defined by statute (UCMJ) and handles violations of the UCMJ. There are three levels of court, listed in the order of increasing severity: SCM, SPCM, and GCM. These courts are distinguished by the quantity of punishment that they can impose, and by the trial procedures that apply to each. The different levels do not specifically distinguish between felony and misdemeanor offenses (as is the case with civilian courts). As an example, either level of court has the power to try a case of robbery or burglary.

b. Convening authority. This is the commander who determines that a case should be tried by court-martial (and by which type of court) and who has the authority to refer the charges to trial. He also appoints the court members. The formal act of sending a particular case to trial is known as the "referral" of the charges. The convening authority, then, is the one who performs the act of referral. Normally, the convening authority will be identified by the level of court that he is authorized to convene. As an example, one would be referred to as the Summary Court-Martial Convening Authority (SCMCA), the Special Court-Martial Convening Authority (SPCMCA), or the GCMCA. The authority

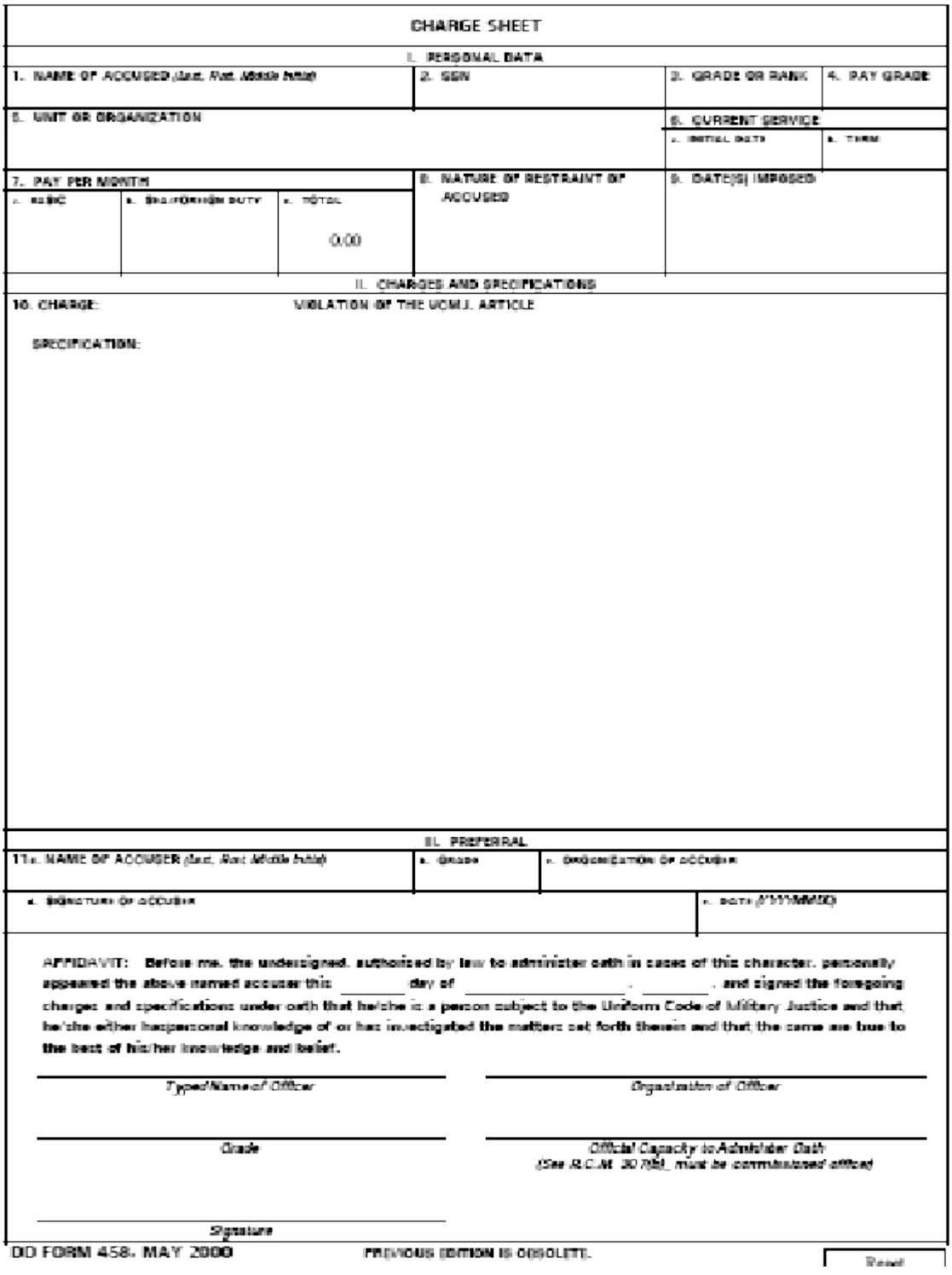
to convene a court-martial is established by statute (the UCMJ), based generally on the size of the unit commanded. The GCMCA, for example, would normally be the post or installation commander. Within the Army, the SPCMCA is normally the brigade commander, and the SCMCA is normally the battalion commander.

c. Staff Judge Advocate. The SJA is the convening authority's legal advisor. This officer is an attorney-member of the JAGC. The SJA is on the staff of the GCMCA. SCM and SPCM convening authorities do not normally have their own SJAs, but would also utilize the services of the post SJA office personnel.

d. Court members. These individuals form the military equivalent of the "jury" at a trial by court-martial (SPCM and GCM). They are military personnel selected by the convening authority to sit on the court and determine the guilt or innocence of the accused. If there is a conviction, they will also adjudge a fair and appropriate sentence. They are either commissioned or warrant officers, and an enlisted accused has the right to be tried by a court that consists of at least one-third enlisted members. This is accomplished simply by his submission of a written request to the convening authority. Court members must be senior to the accused, except in cases of military necessity, where no senior persons are available. Members are chosen by the convening authority on the basis of who is best qualified for such duty by reason of age, education, training, experience, length of service, and judicial temperament (UCMJ, Article 25).

e. Accused. This is the military term for the defendant at a court-martial, who is the one on trial. When a suspect has formal charges sworn out (preferred) against him, he becomes the accused. Until that time, he is normally referred to simply as a suspect.

f. Charge sheet (DD Form 458). This is the formal document which charges an individual Soldier with having committed a crime under the UCMJ. It is the military equivalent of a civilian indictment. It lists, in legal format and terminology, the offenses that the accused has allegedly committed, and for which he is being tried. It sets forth both the Article of the UCMJ violated, and the specific details of the offense. The Article violated is referred to as the "charge." The description of the details of the offense is known as the "specification." A copy is at figure 1-3.



CHARGE SHEET

I. PERSONAL DATA

| 1. NAME OF ACCUSED (Last, First, Middle Initial) | 2. SSN | 3. GRADE OR RANK | 4. PAY GRADE |
|---|---|---|---|
| | | | |

| 5. UNIT OR ORGANIZATION | 6. CURRENT SERVICE | |
|---|---|---|
| | a. INITIAL DATE | b. TERM |
| | | |

| 7. PAY PER MONTH | | | 8. NATURE OF RESTRAINT OF ACCUSED | 9. DATE(S) IMPOSED |
|---|---|---|---|---|
| a. BASIC | b. SEA/FOREIGN DUTY | c. TOTAL | | |
| | | 0.00 | | |

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

SPECIFICATION:

III. PREFERRAL

| 11a. NAME OF ACCUSER (Last, First, Middle Initial) | b. GRADE | c. ORGANIZATION OF ACCUSER |
|---|---|---|
| | | |

| d. SIGNATURE OF ACCUSER | e. DATE (YYYYMMDD) |
|---|---|
| | |

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this _____ day of _____, _____, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

_____ _____

*Typed Name of Officer* *Organization of Officer*

_____ _____

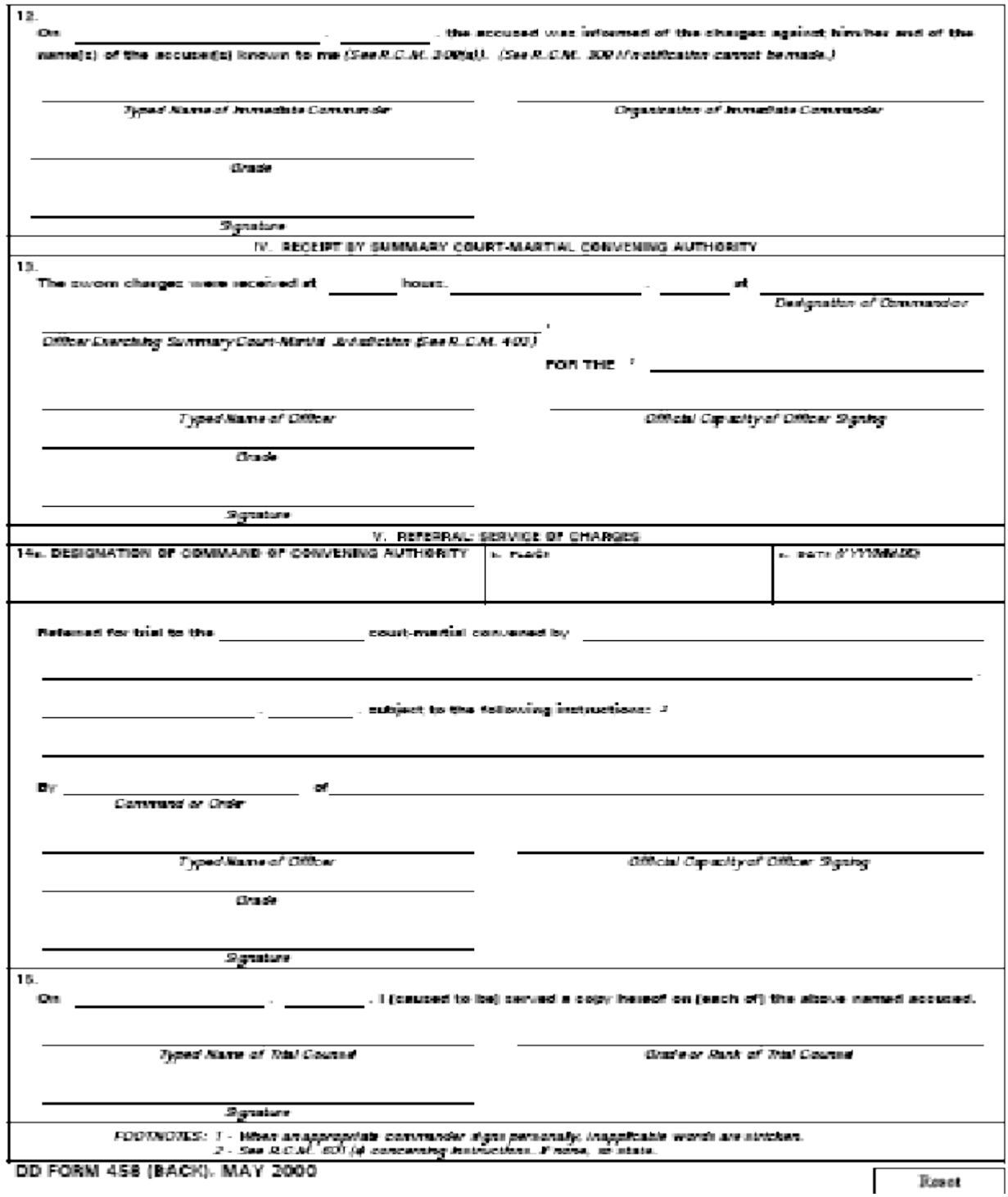
*Grade* *Official Capacity to Administer Oath*
*(See R.C.M. 307(b) - must be commissioned officer)*

_____

*Signature*

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE. Reset

Figure 1-3. DD Form 458, Charge Sheet (Front)


12.
On _____ , _____ , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (*See R.C.M. 308(a)*). (*See R.C.M. 308 if notification cannot be made.*)

*Typed Name of Immediate Commander* | *Organization of Immediate Commander*

*Grade*

*Signature*

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at _____ hours, _____ , _____ at _____
*Designation of Commander*

_____ ,
*Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)*

FOR THE [1] _____

*Typed Name of Officer* | *Official Capacity of Officer Signing*

*Grade*

*Signature*

V. REFERRAL; SERVICE OF CHARGES

| 14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY | b. PLACE | c. DATE (YYYYMMDD) |
|---|---|---|
| | | |

Referred for trial to the _____ court-martial convened by _____

_____ .

_____ , _____ , subject to the following instructions: [2]

_____

By _____ of _____
*Command or Order*

*Typed Name of Officer* | *Official Capacity of Officer Signing*

*Grade*

*Signature*

15.
On _____ , _____ , I (caused to be) served a copy hereof on (each of) the above named accused.

*Typed Name of Trial Counsel* | *Grade or Rank of Trial Counsel*

*Signature*

*FOOTNOTES: 1 - When appropriate commander signs personally, inapplicable words are stricken.*
*2 - See R.C.M. 601(e) concerning instructions. If none, so state.*

DD FORM 458 (BACK), MAY 2000

Reset

Figure 1-3 (Continued). DD Form 458 (Back)

In the military system, all known offenses are normally charged and tried together. The charge sheet is signed by an accuser (usually the immediate commander), who swears that he has probable cause to believe that the accused committed the offenses. Anyone with this knowledge may act as an accuser,

but the accused commander usually fills this role. This is natural, since he is the one who conducts the "preliminary inquiry" into the offense and determines the facts surrounding the incident. The signing of the charge sheet under oath is known as the "preferral" of the charges. Remember that the act of sending a particular case to court is the "referral," and not the "preferral." These two terms refer to totally different acts.

g. Trial counsel. As we explained earlier, this is the prosecutor at a court-martial, who is responsible for the presentation of the government's case. The trial counsel is an attorney-member of the JAGC.

h. Defense counsel. This is the lawyer for the accused. Other than at an SCM, the accused has a right to be represented at trial by counsel. Like the trial counsel, this individual is a JAG officer. The attorney appointed by the Chief, United States Army Trial Defense Service (USATDS) (AR 27-10, paragraph 6-9) to represent the accused is referred to as the "detailed defense counsel." An accused may also request to be represented by another JAG lawyer, who would act as his Individual Defense Counsel (IDC). If such an individual is found to be reasonably available, he will act as the defense counsel, and the original counsel who was detailed will normally be excused. The accused also can hire a civilian lawyer to represent him at trial, but the military will not pay for this. The civilian counsel (if there is one) will work along with the military defense counsel. The accused may request to represent himself, although this is generally not a good idea. If such a request is approved by the military judge, the military JAG lawyer will normally act as the accused "assistant counsel" throughout the trial.

i. Military judge. This is a JAG lawyer who has been certified as competent to preside over trials by court-martial (SPCM and GCM). His role is the same as that of a civilian judge. He is responsible for the orderly conduct of the trial, and decides legal and evidentiary issues that arise during the course of the proceedings. In a judge-alone trial, he will also decide guilt or innocence and will determine the sentence.

j. Confinement. This is the military equivalent of jail. In the Army, a sentence to confinement automatically reduces an enlisted Soldier to the lowest enlisted grade (El). In the Army, a sentence of confinement may be served at a regional confinement facility. More serious offenders will serve their sentence at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. Specific guidance on this is found in AR 190-47.

k. Punitive discharge. There are three types of separations that may be given as part of the sentence of a court-martial: (1) Bad Conduct Discharge (BCD), (2) dishonorable discharge, and (3) dismissal. The sentence to dismissal is for commissioned and warrant officers. Any punitive discharge will affect the

individual's VA benefits, and will also adversely affect his ability to find future employment. Due to its long-lasting effects, this is considered to be an extremely serious form of punishment.

2. Summary court-martial. The purpose of an SCM is to "promptly adjudicate minor offenses under a simple procedure" (RCM 1301[b]). It consists of one commissioned officer on active duty, who should be an O-3 or higher. He is called the summary court officer. This individual is appointed by the convening authority to sit as a court, hear the evidence, and determine the guilt or innocence of the accused. In effect, he will function as the military judge, trial counsel, and defense counsel. If the accused is found guilty of an offense, he will also impose a sentence. There is no military judge here, no trial counsel, and no defense counsel. As was stated, the summary court officer will function in all three of these capacities. The court's function is to "thoroughly and impartially inquire into both sides of the matter and . . . ensure that the interests of both the government and the accused are safeguarded, and that justice is done" (RCM 1301[b]).

a. Although not entitled to legal representation at the trial, the accused has the right to present evidence and to cross-examine witnesses who testify against him. He can also consult with counsel prior to the trial. The SCM officer cannot convict the accused unless he is convinced of his guilt beyond a reasonable doubt.

b. Any person subject to the UCMJ may be tried by SCM, except for commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen (RCM 1301[c]). The SCM is normally used for minor offenses, but may legally try any noncapital offense under the UCMJ (one for which the death sentence is not authorized). Although the SCM may, therefore, legally try serious offenses, it is not generally used for this purpose. A person charged with aggravated arson, rape, or murder would not expect to be tried by this type of court. If a person were tried at SCM for such a serious crime and only got confinement for 1 month, he could not later be retried at a higher level of court-martial (GCM). This would be a double jeopardy violation.

c. An SCM may impose any punishment within the limits set out at RCM 1301(d). The sentence may not exceed confinement for 1 month, hard labor without confinement for 45 days, restriction for 2 months, or forfeiture of two-thirds of 1 month's pay. Enlisted persons E4 and below may be reduced to El. Above E4, they may be reduced one grade. If the accused is above the pay grade of E4, an SCM cannot adjudge confinement, hard labor without confinement, or reduction of more than one grade (RCM 1301[d]). Also, remember that officers may not be tried by this type of court.

d. A conviction by SCM is not considered to be a federal criminal conviction. It remains in the individual's personnel file, however, as a record of his misconduct. An accused may not be tried by SCM over his objection, and must consent to such a trial. If he refuses to consent, he might then be

given an SPCM or a GCM. At these higher levels of court, the accused might face a considerably harsher penalty than what he could receive at an SCM. The decision to turn down an SCM (like the decision to refuse an Article 15) should not be made lightly. If a Soldier is given either an SPCM or a GCM, he does not have an option of refusal, and can be tried regardless of consent. Thus, the consequences of refusing trial by SCM may be severe.

e. The specific procedures for trial by SCM are at RCM 1304(b). The record of trial is much shorter and simpler than that of an SPCM or a GCM. It consists of DD Form 2329, which lists the names of the various parties involved, the charges, the pleas, the findings, and the sentence. It also shows that the accused was advised of his rights, and that he consented to trial by SCM. Also, it shows whether or not he was actually represented by counsel (RCM 1305). A synopsis (or statement) of the evidence and testimony presented at trial is not required. Allied documents (exhibits, witness statements, etc.) are generally attached to the charge sheet. A copy of a completed DD Form 2329 is at Appendix 15 in the Manual for Courts-Martial (MCM) (2005).

3. Special court-martial. The SPCM is a criminal proceeding that can result in a federal criminal conviction if the accused is convicted. This is normally convened by a brigade or equivalent level commander, and is used to try more serious offenses than those dealt with by SCM. It is also used when the accused has refused to consent to trial by SCM. It is composed of a military judge, a trial counsel, and a defense counsel. Unless the accused has requested trial by military judge alone, the court members hear the evidence. They are, remember, appointed by the convening authority. The SPCM consists of three or more court members. Remember, though, that if the accused is enlisted, he may request that the court consist of at least one-third enlisted members. If such a request is made, the convening authority will detail additional members to the court. Frequently, there may be more than one court panel, and one will have the proper percentage of enlisted personnel in the event the accused makes such a request. Although only three court members are required, the convening authority will normally detail five or more. At trial, both the trial and defense counsel may challenge court members for cause (prejudice, prior knowledge about the case, etc.). Also, court members may be ill or TDY at the time of trial, and may have to be excused. If only the minimal membership was appointed, the court membership might fall below the required number. If that happened, the court proceedings might have to be delayed until the appointment of new members.

a. An accused has the right to representation by counsel at an SPCM. This right is set forth at Article 27, UCMJ. The accused, as noted, may also request individual military counsel (IDC) and may hire his own civilian lawyer. Both the trial and defense counsel will be members of the JAGC.

b. An SPCM may try anyone who is subject to the UCMJ. The maximum sentence at an SPCM may not exceed confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, reduction of enlisted offenders to El, and a BCD. In the Army, a BCD is not authorized unless a verbatim record is

prepared. An SPCM may not sentence an officer to confinement, nor reduce or dismiss the officer at this level of court-martial. An SPCM is used to try serious offenses, although not those of the most extreme severity. As an example, it would try assaults, and even aggravated assaults. It would not, however, normally try cases of murder, attempted murder, or manslaughter. In the Army, an enlisted member in pay grade El-E9 who is sentenced to confinement is automatically reduced to El.

4. General court-martial. The GCM is the highest level of court-martial and is normally reserved for the most serious offenders (rape, robbery, murder, etc.). Commanders utilize the GCM for offenses that they feel merit a substantial period of confinement. Any military member may be tried by GCM for offenses committed under the UCMJ (both capital and noncapital). The structure is similar to that of an SPCM. There is a military judge, a trial counsel, and a defense counsel. A verbatim record is prepared. It has a minimum of five court members, although the accused also has the same right to be tried by military judge alone. If enlisted, he may also request that one-third of the court members be enlisted. The court may adjudge a sentence up to confinement for life and even death. The court itself has no upper limit on the sentence it can impose (as does an SCM and an SPCM). To determine the maximum sentence for any specific offense, simply look at the Maximum Punishment Chart at Appendix 12 in the MCM (2000). For robbery with a firearm, for example, the chart states that the maximum sentence includes 15 years' confinement and a dishonorable discharge. At a GCM, the sentence may include anything up to the maximum listed. Thus, the defendant could be sentenced to 15 years confinement. Note, however, that this is the maximum sentence. The accused could also be sentenced to a lesser period of confinement (10 years, 5 years, 2 years, or even no confinement at all). The accused could not, of course, be sentenced to a period of confinement greater than that listed for the offense of which he has been convicted. Recall how this differs from the SCM, and the SPCM. At an SPCM, confinement may not exceed 6 months. If a defendant at an SPCM were convicted of robbery with a firearm (which the chart states is punishable by 15 years confinement), the SPCM could still only sentence him to a maximum of 6 months confinement. A GCM may also adjudge any of the lesser penalties (reprimand, restriction, etc.).

5. The Article 32 investigation. An Article 32 investigation is a prerequisite to a GCM (unless it has been waived freely by the accused). It is the military counterpart to the civilian grand jury or state preliminary hearing. It is a formal investigation conducted by an officer appointed by the convening authority. This officer is detailed to make a "thorough and impartial investigation" and to submit the results thereof back to the convening authority, who is also sometimes referred to as the appointing authority (RCM 405).

a. At the hearing, the Investigating Officer (IO) calls witnesses and examines them under oath. Documents and other exhibits may also be received into evidence. The IO makes findings of fact and his recommendations relating there to are submitted to the convening authority. These involve whether the charges are supported by the evidence, and how they should be disposed of. If the IO finds there is no basis for the charges, he may recommend that they simply be dismissed. If he finds, on the other

hand, that the charges are supported by the evidence, he may recommend that they be referred to trial by GCM, SPCM, or by SCM. He may also recommend that they be disposed of by Article 15 proceedings, or even some other form of administrative action. The IO will also make recommendations regarding the format of the charges.

b. The accused has a right to be present during the hearing, and is represented by his defense counsel. His attorney has a right to examine all evidence and to cross-examine witnesses. The government may also have its representative present at the hearing, who is normally the trial counsel. The accused has a right to present his own evidence (including exhibits and witnesses), and may personally testify if he so desires. He is under no obligation to testify or present evidence. The government cannot call the accused as a witness over his objection. This is due to the Fifth Amendment privilege against self-incrimination.

c. The convening authority must consider the Report of Investigation (ROI). He is not, however, bound by the findings and recommendations of the IO. He is free to dispose of the case at either a higher or lower level than that recommended by the IO. As an example, the IO may recommend trial by SPCM. The convening authority may still refer the charges to a lower level court (SCM), or even dispose of the matter by way of an Article 15. On the other hand, he may choose to refer the charges to a GCM. The Article 32 report, then, is advisory in nature.

d. The content of the report is set forth at RCM 405(j). It must, for example, contain "the substance of the testimony taken on both sides," as well as the IO's conclusions as to "whether the charges and specifications are in proper form." Also, it must contain the IO's conclusions as to "whether reasonable grounds exist to believe that the accused committed the offenses alleged," and his recommendation as to disposition of the charges. As was explained, the report will be furnished to the convening authority who directed the investigation. A copy will also be furnished to the accused.

e. Before a GCM convening authority may refer a case to a GCM, he must refer the matter to his SJA "for consideration and advice" (RCM 406). The advice of the SJA "shall include" a written document that is known as the pretrial advice. This document consists of the following:

(1) Conclusions with respect to whether each specification alleges an offense under the Code.

(2) Conclusions with respect to whether the allegations of each offense are warranted by the evidence indicated in the ROI.

(3) Conclusions with respect to whether a court-martial would have jurisdiction over the accused and the offense.

(4) Recommendation of the action to be taken by the convening authority.

f. On receipt of the pretrial advice, the GCMCA may then refer the charges to a GCM. He is not, however, required to do so. He may still elect to refer the charges to a lower level of court, or may even dismiss them altogether.

6. The initiation of court-martial charges. As was explained earlier, upon receipt of a report of misconduct on the part of one of his Soldiers (CID report, MPI report, etc.), the commander will conduct a preliminary inquiry into the accuracy of the allegations. The commander must be satisfied that the available evidence substantiates the allegations. There is no prescribed format for this inquiry, and it may be fairly informal. The commander may conduct his own, independent investigation, or may rely on the investigative work already done by MPI or CID. If the MPI or CID report is sufficiently thorough, there may be no need for a further investigation. The commander may be able to make his determinations by reading the report. This includes, of course, the exhibits and witness statements contained therein. If, after reading the report, he determines that the charges are unfounded, he can simply drop the matter and take no action. The commander has tremendous discretion in making his decisions. Unless a higher commander has withheld jurisdiction over a certain category of offenses or offenders, the lower-level commander exercises his personal discretion in deciding how to dispose of charges. As an example, as we have seen, the GCM convening authority may reserve for himself jurisdiction to handle all cases of misconduct that involve officers and senior NCOs. As another example, he may reserve for himself jurisdiction over a particular type of offense, such as fraternization. Unless such a situation applies, the immediate commander will exercise his own judgment in handling charges of misconduct.

a. A commander is not required to prefer court-martial charges, or recommend any specific level of court-martial or other punishment. Attempts by higher-level commanders to order subordinates to recommend certain actions (or to coerce them into taking some such actions) may constitute a form of unlawful command influence, which is contrary to the UCMJ. A higher commander may not, for example, tell subordinates that they must recommend a GCM in all drug cases. It is equally improper for the superior commander to instruct a subordinate to give an Article 15 in all cases involving drug offenders. If any cases like this arise, they should be brought to the attention of the SJA, so that corrective action can be taken. If that is not done, improper command influence may result in the dismissal of the charges at trial.

b. If the commander decides that further evidence is required in order for him to make a proper determination, he may detail others to perform the additional investigation, or he may do it by himself. It is a good idea to coordinate with the SJA office, in order to determine when (and what) additional evidence is needed. If the commander does seek to assemble additional evidence, a few points should be kept in mind.

(1) Be sufficiently detailed, so that you can establish the nature and elements of the offense, the time and place of its commission, and the identity of the offenders.

(2) Record the names and addresses of witnesses.

(3) After you question witnesses, prepare summaries of their statements, and have them signed and sworn to. You can also have them write the statement in their own words. The important point is that you need to maintain a record of who was interviewed and what they said.

(4) Determine whether witnesses will be available in the future. Are they about to PCS, ETS, or go on leave? If so, take necessary action to ensure their presence at trial. Waiting until the day of trial may be too late, as the witness may be gone. Coordinate these matters with the trial counsel.

(5) Obtain, mark, and retain for safekeeping, any physical evidence. It is necessary to maintain a proper chain of custody, or chain of control, over the evidence. This may be critical in a drug case where the identity of the substance seized from the accused is a key part of the case. You may have to testify in court a couple of months later and identify the property seized. Make sure you can do so. Unless you somehow mark the evidence, you may find it difficult to accurately testify.

(6) If you question the accused or a person that you suspect of having committed an offense, you must be sure to advise the individual of his rights under Article 31, UCMJ, as well as his right to counsel. The safest way to do this is simply to read his rights to him off of a DA Form 3881, which is a rights warning/waiver certificate. Do not attempt to memorize the warnings and recite them from memory. This will run the risk of your forgetting a portion of the warnings, which may result in the exclusion of the evidence at trial.

c. Once the commander has received the necessary evidence, he must make a decision on how to dispose of the case. As we explained, this can range from deciding that no action is warranted to recommending trial by GCM. In between these two extremes, he may choose from the various administrative remedies that are available. He may also decide to utilize the Article 15 procedures,

formal or informal. Remember that the policy of the UCMJ is to dispose of offenses at the lowest practical level, considering both the offender and the offense. The commander must treat cases individually, and not automatically adjudge a certain predetermined punishment without reference to the individual Soldier who comes before him.

d. If the commander elects to dispose of an offense by means of an action within his authority, he may go ahead and do so. He may, for example, give the Soldier a company level Article 15, either summarized or formal. He could simply counsel the Soldier also. If he decides that something more severe is needed, which is beyond his authority to administer, he must recommend such action to the appropriate higher commander. If, for example, he decides that a field grade Article 15 is appropriate, he must forward the case through command channels to the superior commander. In such a case, the company commander would forward the investigation and his recommendation to the battalion commander. The same result would follow if the company commander decided that a court-martial was necessary. He would forward the case to the higher commander, with his recommendation regarding the proper level of disposition (SCM, SPCM, or GCM). As we will see shortly, the company commander would prepare the charge sheet, sign it as the accuser, and forward this along with the other documentation pertaining to the case. Such actions are simply forwarded up the chain of command until they reach the convening authority.

e. When charges reach the next higher commander, that commander will make his own inquiry into the validity of the allegations. This may consist simply of reviewing the evidence already accumulated. The higher commander may concur or nonconcur with the recommendation of his subordinate. If the company commander recommended a field grade Article 15, the battalion commander may concur, and would simply go ahead and administer that action. If the company commander recommended a trial by SPCM, the battalion commander may go ahead and refer the charges to trial to SCM (assuming the battalion commander is the SCM convening authority). Since the battalion commander is normally not the SPCM convening authority, he could not himself refer the charges to trial by SPCM. If he concurred with the recommendation for trial by SPCM, he would forward the case up to the next higher commander (brigade level), along with his concurrence in recommending trial by SPCM. When the charges reach the SPCM convening authority, he will investigate the charges and make his determination regarding whether or not the charges are supported by the evidence. If he feels they are, he may go ahead and refer the charges to trial by SPCM. He does not have to do this, however, and may also refer the charges to trial by SCM, or may return the file to the lower commander and tell him to handle it at <u>his</u> level. On the opposite end of the spectrum, he could also recommend a trial by GCM, and forward the file up to the GCM convening authority (RCM 404).

f. The point to keep in mind is that each commander in the chain will review the charges and make his own, independent determination regarding their validity. None will function simply as a rubber-stamp for decisions made by another commander (either at a higher or a lower level). At any level, a commander may dispose of the matter by taking action that is within his authority or by returning the

charges to a lower level for disposition. At the same time, each commander in the chain may also refer the charges to a higher level for disposition. When the charges reach a commander who decides that he can properly dispose of the matter by taking action that is within his authority to take, the matter can be handled at that level. At this point, the charges may be referred to trial by court-martial. Much will depend on the nature of the charges, of course. If the case involves extremely serious allegations, such as rape, armed robbery, or murder, most commanders would inevitably recommend trial by GCM, and concur in such recommendations coming from subordinate commanders.

7. Drafting charges. If the company commander decides that a court-martial is appropriate, he should know how to initiate the same. Although he cannot refer the charges to trial (he is not a convening authority), he plays an extremely important role in the process of getting a case to trial. Remember that the commander must exercise his personal discretion (unless a superior commander has withdrawn authority over a type of offense or offender). The possible actions that a commander may take are briefly set out at RCM 306. If a court-martial is to be recommended, the commander will normally prepare a charge sheet, which is then processed through the chain of command up to the appropriate convening authority. Before specifically explaining the process of preparing a charge sheet, the commander should be aware of some basic rules.

a. Act promptly. An accused must be brought to trial within 120 days after notice of preferral of charges, or the imposition of pretrial restraint (whichever occurs earlier). In all cases, an accused should be notified of the preferral of charges as soon as is practical (RCM 308). When he is put in pretrial confinement, he is entitled to prompt notice of the charges (RCM 305). Speedy trial requirements must be recognized and complied with, or the result may be a needless dismissal of the charges. Consult with JAG on issues such as this.

b. Drafting charges must be done with care. This document serves to tell the accused what specifically he is alleged to have done. It is a record of who preferred, forwarded, and referred the charges. These matters may be extremely important for speedy trial, pretrial confinement, and jurisdictional issues which may arise at trial. Inattention to dates and careless recording of what took place can severely jeopardize the government's position at trial.

c. If the charge is defective and fails to state an offense, it may result in the dismissal of the case at trial. This can prove embarrassing and can be avoided by coordinating the matter in advance with JAG. It is a good idea to work with the SJA office in the drafting of charges. In some commands, the attorney will either assist in reviewing the proposed charges, or may draft them by himself.

d. Under the UCMJ, anyone can prefer court-martial charges (RCM 307). Since the commander is the one who receives the report of investigation regarding the misconduct of his personnel, however, he

normally is the one who prefers the charges. A charge simply identifies the Article of the UCMJ that was allegedly violated. The specification is the specific substance of the charge. It states the facts that constitute the violation. In other words, the charge might simply read "UCMJ, Article 128," which is assault. The specification would state who was assaulted, when, and how.

e. Charges must be accurate and complete. Unless the specification sets forth the necessary elements of the offense, it may result in a complete dismissal of the case at trial. In drafting charges, some general rules should be observed:

(1) Do not save or accumulate charges in order to obtain greater punishment.

(2) What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.

(3) Normally, charges for minor offenses should not be joined with those for serious offenses.

(4) If two or more persons acted together with common intent in committing an offense, joint charges should be considered.

f. The process of drafting charges involves the following:

(1) By reference to the UCMJ and the MCM, determine the Article of the UCMJ that appears to have been violated.

(2) Study the Article and understand what constitutes the offense. Look up the description of the Article in Part IV of the MCM. This discusses the elements of the offense that must be proven.

(3) Once you have determined the elements of the crime, determine whether or not the evidence satisfies all of them. Remember, if you must prove five things, proving four out of five will not suffice. If you cannot prove the offense, can you prove a lesser, included offense, or possibly a closely related but less serious offense? As an example, if you are unable to satisfy all of the elements

for aggravated assault or attempted murder, can you prove assault and battery? If not, can you prove simple assault?

(4) Write the charges and specifications in Part II of the charge sheet (DD Form 458) (figure 1-3). Remember that a different form (DD Form 2329) is used for an SCM. This should be done (along with all of the other steps above) in coordination with the trial counsel. If not, at least have the trial counsel examine the charges you have drafted. He is the one who will prosecute the case (SPCM or GCM) at trial. If the charges are defectively drafted, or charge the incorrect offense, he may be unable to effectively do so.

g. Once the charges have been drafted, the commander completes the affidavit at Part III of DD Form 458. He swears that the charges are correct to the best of his knowledge. He must take the oath in the presence of an officer authorized to administer oaths. Article 136, UCMJ, states who can administer oaths. This may be the battalion adjutant or a JAG officer, among others. The completion of page one of the charge sheet constitutes the preferral of charges. The person who prefers them is referred to as the accuser. Also, note that personal data information is called for in Part I of the charge sheet (name of accused, rank, pay grade, nature of pretrial restraint, etc.).

h. Once the charges are preferred, the commander is required to advise the accused of the charges (RCM 308). This can be done simply by reading the charges and completing item 12 on page two of the charge sheet. The commander then forwards the charge sheet up to the next higher commander, along with his recommendation for trial by court-martial. The charge sheet is forwarded along with the allied papers (witness statements, MP/CID report, etc.). Sufficient information must be provided so that the next higher commander can make his own independent judgment regarding the merits of the case, and how to best dispose of the charges.

i. The charges are forwarded to the officer exercising SCM jurisdiction over the accused. This, of course, is the person we refer to as the SCMCA. If the company commander had originally recommended trial by SCM, the SCMCA could go ahead and refer the case to trial. He could also, however, return the case to his subordinate and tell him to handle it at his level. At the same time, he could also forward it up to the next higher commander, and recommend trial by SPCM or GCM.

j. Even if trial by SPCM or GCM was originally recommended, the charges are still sent first to the SCMCA, along with the allied papers. In other words, the charges go up through the chain of command. This commander, if he concurs, will then forward the charges to the SPCMCA, along with his recommended disposition. In either situation, the SCMCA will complete Part IV of the charge sheet. This shows when the sworn charges were received by him.

k. The commander who ultimately refers the case to trial will complete Part V of the charge sheet. Remember, this commander is called the convening authority. He, too, must personally determine that such is warranted by the evidence. The specific procedures for accomplishing this are at AR 27-10, paragraph 5-16, and also at RCM 601. Before a case is referred to a GCM, remember the requirement for the Article 32 investigation, as well as pretrial advice by the SJA. Once the charges have been referred to trial, the trial counsel will cause a copy thereof to be served on the accused, and will then complete item 15 on the charge sheet. An accused is entitled to a copy, and in peacetime may not (over his objection) be tried by GCM within 5 days after service of charges (3 days for trial by SPCM). This requirement is found at RCM 602. Charges will generally be served shortly after referral and upon their receipt by the trial counsel. A copy of a charge sheet follows (figure 1-3). It is not an exceedingly complicated document and attention to the basic guidelines set out above will avoid unnecessary difficulties in processing a case from the preferral of charges to the actual referral to trial.

l. Remember to process the case expeditiously. Speedy trial requirements can result in the dismissal of a case if this is not done. The fact that a charge sheet has been filled out incorrectly and needs to be redone is not an excuse for violating applicable time limitations. Also, Article 10, UCMJ, states that when a Soldier is put in pretrial confinement, immediate steps must be taken to inform him of the charges and to either try him or dismiss the charges. In cases where there is other pretrial restraint, such as restriction, the accused must be tried within 120 days. If you encounter unanticipated processing delays, they should be brought to the attention of the trial counsel. In all cases, it is important to again emphasize the need for coordination with JAG. The attorney who will represent the government at trial must be involved in the case from its early stages, so that any difficulties can be resolved prior to trial. Many speedy trial difficulties can be dealt with in this fashion. Coordination with JAG at an early stage also assists in identifying essential witnesses. Delays can be prevented by not allowing these witnesses to depart from the command, or by at least keeping track of their whereabouts. This is particularly important where the witness is a civilian. If the witnesses have left, arrangements can be made for their return for the trial. Again, a coordinated effort is essential.

m. Article 33, UCMJ, states that when a Soldier is being held in pretrial confinement for trial by GCM, the commander shall (if practical) forward the charges and allied papers to the GCMCA within 8 days. If this cannot be done, he must explain why in writing. Unexplained, unreasonable, or excusable delays must be avoided if at all possible.

8. Pretrial confinement. A commander is authorized to impose pretrial restraint by RCM 304. He may, for example, place the Soldier in pretrial confinement (as well as other forms of limitations upon his liberty). The commander must have a reasonable belief that the Soldier committed an offense triable by court-martial, and that the restraint is required by the circumstances. Other than actual confinement, this is done by notifying the Soldier (orally or in writing) of the fact of restriction and the limits thereof. Such measures are not required in every case, or even in most cases. Article 13, UCMJ, states that punishment before trial is prohibited. Pretrial confinement then, must be necessary, and not

imposed simply as punishment. If confinement is imposed, it may be no more rigorous than is required by the circumstances. If not properly imposed, it may be found by a court to constitute illegal pretrial punishment.

a. An accused is presumed innocent until his guilt has been proven beyond a reasonable doubt. Thus, punishing him before trial is improper. Consequently, "unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom, restrictions unnecessary to meet that need are in the nature of intolerable unlawful punishment." U.S. v. Heard, 3 MJ 14 (Court of Military Appeals [CMA] 1977). An accused awaiting trial "should ordinarily continue the performance of normal duties within his or her organization while awaiting trial" (AR 27-10, paragraph 5-15).

b. To justify pretrial confinement, two issues must be addressed. The first is the basis for the confinement, and the second is whether a lesser form of restriction would suffice to meet the need. Turning to the first issue, confinement may be appropriate where there are reasonable grounds to believe that the accused committed an offense triable by court-martial and it is foreseeable that (1) he will not appear at a trial, pretrial hearing, or investigation; or (2) he will engage in serious criminal misconduct (RCM 305[h][2]B). Under the first ground, the need is to ensure the accused presence at trial. Is he a flight risk? This may be shown by his prior record of going Absent Without Leave (AWOL). Also, he may have made statements that evidence his intent not to remain for the trial. His behavior may also reveal such an intent (buying airline tickets, packing, etc.).

c. The importance of protecting the community is reflected in the second ground. This includes any efforts on the part of the accused that are aimed at obstructing justice. The threat of future serious criminal misconduct may be evidenced by the severity of the offense itself, the prior record of the accused, and statements or actions of the accused.

d. As should now be apparent, pretrial confinement is not appropriate merely because the commander considers the accused to be a "pain in the neck." It must be based on the factors noted above, which need to be carefully documented. The overall determination should consider such issues as the nature and circumstances of the offense, whether there are any extenuating circumstances, the weight of the evidence, the accused ties to the locale (including family, off-duty employment, financial resources, and length of residence), his character and mental condition, his service record (including prior misconduct), his record of appearance at (or flight from) other pretrial investigations, trials, and similar proceedings, and the likelihood that he can and will commit further serious criminal misconduct if allowed to remain free pending trial. This latter term "includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the command or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States" (RCM 305[h][2]B).

e. Only when one of the two basic grounds is found to be present will the inquiry shift to the second issue. Here, the commander must find that less severe forms of restraint are inadequate. As we noted, restraint must be only the minimum that is necessary under the circumstances. The commander must be able to reasonably conclude that the lesser measures would not be sufficient.

f. A person to be confined will be placed under guard and taken to the confinement facility (AR 27-10, paragraph 5-15). The commander who orders pretrial confinement should prepare a confinement order (DD Form 497). He should also complete a checklist for pretrial confinement (DA Form 5112-R). This will include a statement of the basis for the decision to confine the accused (AR 27-10, paragraph 9-5[b]2). Before placing an accused in confinement, the commander should inform him of the offenses of which he is accused. If this cannot be done prior to confinement, then immediate steps will be taken afterward (AR 190-47, paragraph 4-4b). Coordination with the trial counsel is essential to ensure that all necessary procedures have been accomplished properly. Defense counsel must be provided within 72 hours (AR 27-10, paragraph 5-15b). Pretrial confinement will be reviewed by a neutral and detached officer, usually a military magistrate, within 7 days. United States v. Rexroat, 38 MJ 292 (CMA 1992). Unless it was properly imposed, the Soldier may be released from confinement. Also, at trial, the accused may contest the legality of the confinement.

g. Always remember that when an accused is put in pretrial confinement (or when any pretrial restraint is imposed), the government must proceed promptly with its handling of the case. If this is not done, the result may be dismissal of the case. Coordination with the trial counsel will ensure that restraint was legally imposed, and that the right of the accused to a speedy trial was not inadvertently violated.

9. Trial procedure. The convening authority is the person who refers the charges to trial and appoints (details) the court members. If the accused makes a request, the convening authority will also detail enlisted members to the court (assuming, of course, that the accused himself is enlisted). This requires a written request from the accused (UCMJ, Article 25[c]1). Remember that the accused may also request trial by military judge alone. Recall that the accused may also request the appointment of IDC, and may choose to retain civilian counsel at his own expense. The Soldier also has a right to defend himself at trial.

a. At trial, the accused may plead guilty or not guilty. If there are several charges, he may elect to plead guilty to some, but not all, of them. Frequently, the accused will offer to plead guilty to some of the charges (or perhaps all of them) in exchange for some concessions from the government. This is known as a pretrial agreement. It is simply an agreement between the accused and the convening authority. If the accused pleads guilty, the convening authority agrees that he will limit the sentence that he might otherwise be able to approve. In other words, he may agree to approve no confinement in

excess of one year, or may agree to approve no confinement at all. As another example, he may agree to approve no punitive discharge (BCD or dishonorable discharge), or may agree to approve no forfeiture of pay. As opposed to not approving certain parts of the sentence, he may also agree to suspend them.

b. An accused may also offer to plead guilty to a lesser charge, if the government will make certain concessions. This is simply another form of pretrial agreement. The accused may offer to plead to a lesser, included offense in exchange for the government's promise to limit the sentence (as noted above). The government may also agree not to attempt to prove the greater charge. As an example an accused charged with intentional murder may offer to plead guilty to voluntary manslaughter (which is a lesser degree of homicide). The accused will thereby be able to limit the seriousness of the offense he is convicted of, as well as the maximum sentence that he is exposed to. For the government, such an agreement saves considerable time, expense, and manpower. If there is a pretrial agreement, the trial will be considerably shorter. Such agreements are commonly used in civilian criminal trials as well.

c. The first part of the trial is called the Article 39A Session. Here, the military judge will advise the accused of his rights, and make sure that he understands them. This includes the right to counsel, and the right to trial by military judge alone and the right to have enlisted personnel on the court. At the conclusion of this procedure, the accused will be arraigned. The process of arraignment simply consists of reading the charges to the accused and asking how he pleads. Frequently, the accused will waive the formal reading of the charges in court. Prior to the actual entry of a plea (guilty or not guilty), the military judge will ask if the defense has any motions to raise. Any motions must be raised at this point, or they will be considered waived, or voluntarily abandoned. The accused may make such motions as one to dismiss a charge because it fails to state an offense, or omits critical elements of the offense. Also, he may move to suppress a confession taken without necessary Article 31 warnings. He may also move to suppress (or exclude) the results of a search he contends was illegal. Other common motions involve whether or not the court has jurisdiction over the individual or the offense, speedy trial, and double jeopardy issues.

d. At this session of the trial, both sides may also raise evidentiary matters. This includes both the defense counsel and the trial counsel. Either side may seek a ruling from the military judge that would bar, or prevent, the other side from introducing certain evidence or testimony.

e. Depending on the results of the motions raised, there may be no subsequent trial. If a suppression motion is granted, the military judge may exclude certain evidence from court. This may consist of a confession, or possibly physical evidence (gun, knife, other weapon, clothing, etc.). This is based on what is called the exclusionary rule. This rule simply states that illegally seized evidence is not admissible (subject to certain exceptions). Without the confession or the evidence, the trial counsel

may be unable to prove his case. If this happens, the trial counsel will normally contact the convening authority, so that the case may be dismissed.

f. Once the motions have been disposed of, the case will now proceed. The accused will enter his plea(s) to the charge or charges. If the accused pleads guilty, the military judge will conduct what is called a providency inquiry. The purpose here is to ensure that the accused knows what he is doing when he pleads guilty. In other words, he must know the meaning and effect thereof. The military judge will question the accused and must be satisfied that the pleas are voluntary and intelligently made. A plea of guilty, for example, waives certain basic constitutional rights. The most obvious, of course, is the right to a trial on the issue of guilt or innocence. The military judge will explain these various rights to the accused, and ensure that he understands them. This is still at the Article 39A Session, commonly called the "pretrial session."

g. After the accused has pleaded to the charges, the military judge will ask if there is a pretrial agreement. If there is, he will review it with the accused, to make sure he understands its terms, what is required of the government, and what is required of the accused. The military judge may reject terms of a pretrial agreement if he finds it is contrary to public policy or otherwise unconscionable (unfair). In other words, the military judge is not a mere rubber stamp. He is not required to accept such an agreement. A similar rule governs a plea of guilty. The military judge may reject a plea of guilty if he feels it is not voluntarily made, or if he is not satisfied that the accused is, in fact, really guilty.

h. If there is a trial before court members, both the trial and defense counsel will have an opportunity to put questions to the court members, either as a group, or individually. A member is subject to challenge for cause if he has already formed an opinion as to the guilt or innocence of the accused, or is otherwise somehow biased or unable to fairly reach a decision based on the evidence. Questions of this nature may also be put to the military judge, who is also subject to challenge for cause. Even where trial is before the court members, the military judge could still be challenged, since he will be ruling on legal and evidentiary issues that arise during the trial. It is not common for a military judge to be successfully challenged on this basis, however, since he is generally presumed to be aware of the law governing this area, and to be able to comply with it.

i. Before the introduction of evidence, both sides may make an opening statement. This is simply a brief summary of what the facts are going to show during the trial. It assists the court members (or the military judge) by identifying key issues early. It is similar to an outline, which helps the court to understand and interpret the evidence. It is particularly helpful in a more complex case, where there may be numerous legal and factual issues, and several potential defenses to the charges. Without such an opening statement, it may otherwise be difficult for the court members to clearly understand why certain evidence is being offered at all. The attorneys may waive an opening statement, but this is not normally done.

j. Following opening statements, the trial counsel presents the government's case. This is where the trial counsel tries to prove that the accused is guilty of the charge(s). He may introduce various forms of legal and admissible evidence (physical evidence, documents, expert testimony, eye-witness testimony, etc.). If the accused has pleaded guilty, of course, this part of the trial may not apply, or may be very short. After a witness testifies, the opposing counsel may cross-examine him. Once the trial counsel has finished with the presentation of the government's case, he will "rest." The case for the government is then at an end, and the defense will present its case. In a criminal case, an accused is presumed innocent until the government has proven his guilt beyond a reasonable doubt. At trial, then, the defense does not have the burden of proving anything. The burden of proof is entirely upon the government, and does not shift to the defense during the trial. The defense may elect to present no evidence at all, and may simply contend that the government has been unable to prove its case beyond a reasonable doubt. In other words, the government must prove he is guilty; the defense does not have to prove he is innocent.

k. Although the defense does not have to present any evidence, it usually will do so. Sometimes, the defense may present more evidence than the prosecutor introduced. The defense may present its own documentary evidence, exhibits, witnesses, etc. The accused himself may take the stand and testify as a witness, but he does not have to. His failure to do so cannot be used against him (based on the Fifth Amendment right against self-incrimination).

l. If the defense has presented some evidence, the trial counsel then has an opportunity to introduce rebuttal evidence. This is evidence that rebuts, or refutes, what the defense has just presented. The defense may then itself introduce rebuttal evidence, to rebut the government's rebuttal evidence. Theoretically, this scenario could go on for quite some time. The military judge monitors the proceedings, however, and will ensure that the evidence presented is relevant and not simply repetitive. In most cases, each side introduces rebuttal evidence on one occasion only. In more complicated cases, the situation may differ, but such is not the norm.

m. During the presentation of evidence, the attorneys on both sides frequently object to the admissibility of certain items. This simply means that they contend the evidence is being improperly brought to the attention of the court, and that it should not be admitted. A good example of this is the rule against hearsay. Out of court statements are not admitted (subject to certain exceptions) due to a fear of their unreliability and the lack of an ability to confront the individual making the statement. The military judge rules on these objections. If he overrules the objection, this means he allows the evidence to be admitted. If he sustains the objection, then the evidence is not admitted.

n. The Military Rules of Evidence (MRE) are at Part III of the Manual for Courts-Martial (2005). They are adapted from the Federal Rules of Evidence (FRE), which are used in federal civilian court trials. Most of the differences between the two are in terminology. The MRE also include constitutional rules, which govern the admissibility of confessions, and the rules concerning search and seizure.

o. At the conclusion of the presentation of evidence, attorneys for both sides may make closing statements. The trial counsel goes first, followed by the defense. Then, the trial counsel may make a brief rebuttal argument in response to issues the defense has raised. The trial counsel will argue his theory of how the crime was committed and why the evidence conclusively proves the accused is guilty. The defense, on the other hand, will argue that the evidence is insufficient to prove guilt beyond a reasonable doubt. The defense may attack the credibility, or believability, of the government witnesses and/or may suggest other explanations for the evidence that are not criminal. He may argue that the accused committed certain acts, but is still not guilty of the crime charged. In other words, he may argue the crime was really the result of accident, mistake, self-defense, etc. In some cases, he may contend that the accused is only guilty of a lesser offense. In a charge of attempted murder, for example, the defense may argue that the evidence, at most, only shows assault and battery. These arguments may be waived, but such is rarely done.

p. In arguing to the court, both sides will be expected to forcefully present their positions. They may strike hard blows, but they must be fair ones. They may not argue facts that are not in evidence, and may not misstate the evidence. Neither side may express a personal belief as to the guilt or innocence of the accused. The trial counsel may not comment on the failure of the accused to take the stand and testify. The attorneys may argue reasonable inferences from the evidence. The military judge will monitor the arguments, to ensure that neither side violates the applicable restrictions.

q. At the end of the closing arguments, the military judge will instruct the court members on the law. In a trial by military judge alone, the judge may deliberate in private to consider all of the evidence and then reconvene the court to announce his decision. If there are court members, they will be given instructions on such things as the elements of the offense, the burden of proof, etc. The military judge may not express to the court members his personal opinion regarding the guilt or innocence of the accused. Before the instructions are given to the court members, there will be an out-of-court session with the military judge and the attorneys for both sides. The accused will also be present. The military judge will explain which instructions he is planning to give. Either attorney may request additional instructions, or object to those that the military judge intends to give.

r. After receiving instructions, the court members will adjourn to a private room, called the deliberation room, where they will discuss the facts and the evidence, and arrive at their findings (verdict). In a trial by military judge alone, remember, the findings may be announced immediately after the presentation

of evidence and arguments by the attorneys. Since there are no court members in such a situation, there would be no need for instructions. When there are court members, the deliberations may take several hours, or longer, depending on the complexity of the charges, the number of charges, etc. The court members are the only persons present during the deliberations, and each court member, regardless of rank, has a right to express his own views. The senior member of the court is the president of the court, but all members have equal votes.

s. Once court members have sufficiently discussed the facts and the evidence, they will vote by secret written ballot on the guilt or innocence of the accused. It takes a two-thirds vote to find the accused guilty. A lesser vote will result in a finding of not guilty. The military, then, does not have a "hung jury" or findings. This frequently occurs in civilian criminal trials, when the jury is unable to reach a decision. Since the military does not have a requirement for a unanimous finding, the vote will either find the accused guilty or not guilty. Thus, he will not face the prospect of a retrial in the event of a hung jury. Once findings are reached on all of the charges and specifications, the court members return to the courtroom. The president of the court announces the findings in the presence of the military judge, counsel for both sides, and the accused. If the accused is found not guilty, the court-martial is over. If he is convicted of any offense, the trial proceeds to the sentencing phase.

t. At sentencing, the trial counsel may offer into evidence matters that will help guide the court in imposing an appropriate sentence. This includes evidence of prior convictions, evidence of aggravation, and evidence of the rehabilitative potential of the accused (RCM 1001). Evidence in aggravation includes any aggravating circumstances directly relating to or resulting from the offense. An example would be the effect of an assault on the victim's family (victim out of work, loss of income, etc.). Another example would be the psychological impact of a sexual assault upon the victim. Evidence of rehabilitative potential is an opinion regarding the "previous performance [of the accused] as a servicemember and potential for rehabilitation" (M.R.E. 1001[b]5).

u. At sentencing, the defense may also offer evidence, either to rebut the prosecutor's evidence, or in extenuation and mitigation. This may show, for example, the reasons the accused committed the offense. This evidence may support an argument for leniency, and may be used to argue that the offense is not quite as serious as it may otherwise seem. The accused may also introduce evidence of his prior good record. The accused may testify at this stage of the trial, either under oath or he may make an unsworn statement. If he makes an unsworn statement, the prosecutor cannot cross-examine him. His unsworn statement may also be read to the court by his attorney.

v. Both attorneys then may argue to the court their views as to what constitutes a fair and appropriate sentence. The trial counsel argues first, followed by the defense. Arguments may refer to any matters introduced during the sentencing phase of the trial. They may also refer back to matters that were introduced during the findings stage of the trial. Thus, there is no need to reintroduce evidence that had

earlier been presented. Normally, the government will argue for a harsh sentence, in view of the seriousness of the offense and the defendant's prior record (assuming these factors support such an argument). The defense will argue for a lighter sentence, stating that stiff punishment is unwarranted. The defense may show that the accused has no prior record of misconduct, and that this is his first offense.

w. As was the case with arguments on findings, there are limits here to what counsel may legally argue. The trial counsel, for example, may not argue what the convening authority's position is with regard to an appropriate sentence. Also, he cannot refer to the failure of the accused to testify.

x. If there is a pretrial agreement, the court members will not know of this fact. At trial, then, the defense is free to try to "beat the deal." If the agreement limits confinement to 2 years, the defense may still argue for no confinement at all. If trial is by military judge alone, the judge will know there is such an agreement, but he will not know the specific sentence limitation until after he has imposed a sentence.

y. After sentencing arguments are completed, the military judge will instruct court members on the procedures applicable to sentencing. This will involve a discussion of what constitutes the maximum sentence, and procedures for voting. He will also discuss the various forms of punishment. The members will then return to the deliberation room to discuss the issue of what constitutes a fair and appropriate sentence. Following the discussion, voting is by secret written ballot. Only the court members are present here. Each member may propose a sentence, in writing, which the court members all vote upon (beginning with the lightest sentence). A death sentence requires a unanimous vote. Confinement for more than 10 years requires a three-fourths vote. Otherwise, a two-thirds vote is required (RCM 1006d). If less than two-thirds of the members agree on a sentence (or whatever other percentage is required), then that sentence has not been approved. The court members will then proceed to vote on the next sentence (in order of increasing severity). If trial is by military judge alone, of course, he would simply announce the sentence at the conclusion of the arguments of counsel. Otherwise, when the court members finally agree on a sentence, the court is reconvened, and the sentence is announced.

z. The court members will then depart. At this point, the military judge will advise the accused of his appellate rights. These matters are at RCM 1010. If there was a pretrial agreement, the military judge will now go over its sentence limitations with the accused and explain them in detail. The court-martial will then be adjourned (RCM 1011).

10. Post-trial procedure. Following trial, a Record of Trial (ROT) is prepared IAW RCM 1104. This is reviewed by the military judge for completeness and accuracy. The trial counsel will serve a copy of

this document on the accused. Before a convening authority may take action on a ROT of a GCM, or an SPCM that includes a BCD, he must first receive a recommendation from the SJA or legal officer (RCM 1106). A copy of this recommendation, called the "Post-trial Advice," is also served on the defense counsel. The defense has 10 days in which to submit a response thereto to the convening authority. This response is optional. If the SJA recommendation contains nothing that is felt to be objectionable, there may be no need for a response. The convening authority then takes final action on the ROT IAW RCM 1107. The accused may also (in addition to his right to respond to the SJA's recommendation) submit matters to the convening authority in furtherance of a plea for clemency.

a. The convening authority may approve or disapprove the findings and/or the sentence. He may lessen the severity of the sentence, but he may not increase it. Additionally, he may suspend part (or all) of the sentence. As we saw in the case of pretrial confinement, the military does not use a bail system. Similarly, if one is sentenced to confinement, there is no system of bail pending appeal. Instead, the accused would normally begin serving the sentence to confinement immediately. He may request, however, that the convening authority defer the confinement (postpone it) until the time when he takes action on the ROT. At that time, the accused would either begin serving the confinement, or the convening authority may further agree to suspend the confinement, or possibly even disapprove it.

b. If the convening authority approves a sentence that includes a punitive discharge (BCD or dishonorable discharge) or confinement of a year or more, the accused has a right to a review of his conviction by the Court of Criminal Appeals IAW RCM 1201. Appellate defense counsel will be appointed to represent the accused on the appeal, furnished by the government at no cost to the accused (RCM 1202). On appeal, the legality of the original conviction and the trial proceedings are at issue. If error is found on a review of the ROT, the conviction may be reversed. If there is no error, the appellate court will uphold, or affirm, the conviction. If the Court of Criminal Appeals upholds the conviction, the accused may seek further review from the highest military court, the U.S. Court of Appeals for the Armed Forces (CAAF) (RCM 1204). This review is discretionary, and the court may elect not to hear or consider the case. Whether or not it will do so depends on such things as the presence (or absence) of a substantial question of law that merits the attention of the court. The JAG of the branch of service concerned also has the right to submit a specific case to this court for review. Unlike a request coming directly from the accused, the court cannot refuse to respond to a question coming from the JAG. Such a request might be used to answer an important question of law, since the CAAF is the highest legal authority within the military system. Another situation might be where the different Courts of Criminal Appeals are in conflict with one another on a specific issue of law. In other words, the Army Court of Criminal Appeals (ACCA) may have ruled differently on an issue than did the Navy/Marine Court of Criminal Appeals (NMCCA). To further complicate matters, the Air Force Court of Criminal Appeals (AFCCA) may rule differently than either of the other courts. To ensure uniformity, the CAAF may decide the question.

c. The CAAF is the supreme military court. It, too, may affirm or reverse a conviction. It may also return a case to the Court of Criminal Appeals for corrective action. As noted, the CAAF ensures necessary uniformity (where such is necessary). Since each branch of service has its own Court of Criminal Appeals, each might otherwise develop its own totally separate system of law. Without a supreme military court, the concept of a "uniform" code of military law could lose any real meaning.

d. Under RCM 1205, issues decided by the CAAF may also be appealed to the U.S. Supreme Court. Review by the Supreme Court is discretionary. The Supreme Court will only hear such cases it desires to consider, such as those involving an important issue of constitutional law. There is also a procedure whereby an accused may petition the military courts for a new trial, based on the limited grounds of newly discovered evidence (not previously discoverable through the exercise of due diligence, and which would probably produce a substantially more favorable trial result for the accused), or a fraud which was perpetrated upon the trial court (RCM 1210).

d. Overall, the procedures applicable at courts-martial are similar to those used in federal and state civilian court trials. The system observes both the needs of the services and the rights of the accused.

## PART F - TESTIFYING AT TRIAL

1. No matter how good the investigative effort was (or the case against the accused may be), that effort may be ruined by the manner in which the government witnesses testify at trial. This is true whether the witnesses are law enforcement officers, commissioned officers, warrant officers or NCOs. In a criminal case, any of these individuals may have played a critical role in the apprehension of an accused in a search, or in the taking of a confession. A sloppy appearance, poor attitude, apathy, and an overall lack of professionalism on the witness stand may destroy the credibility of the witness and ruin the effect of their testimony. Since they may be the main government witnesses, such matters can, in effect, ruin the government's case. A case is only as good as the facts, and the way that the facts are presented in court. A witness must prepare himself for testifying, whether at a court-martial or at some other administrative hearing. The entire investigative process may be thought of as leading up to the trial. This is particularly true for the MP officer, who will be testifying as a professional law enforcement officer. His inability to testify may jeopardize the entire case.

a. Pretrial responsibilities. The investigator or other witness must be sure that the evidence he has seized is properly marked. Otherwise, he may be unable to identify it in court. The evidence must also be properly safeguarded in order to ensure there is a proper chain of custody. The investigative effort itself must have been sufficiently comprehensive and thorough, as well as impartial. All relevant witnesses should have been located and interviewed.

b. The investigator must accurately prepare notes and records of what has taken place. These can be used at trial to refresh memory, so there is no need to attempt to memorize them. If the notes are incomplete or inaccurate, however, they may be of little use.

c. Witnesses should always cooperate with the trial counsel. Make sure all facts and evidentiary matters have been recorded and that the trial counsel has been appraised of them, not just the ones that favor the case. If the case has a weak spot, the trial counsel should know about it. The witness should discuss his expected testimony with the trial counsel. The witness should also understand how his appearance at trial will fit in with the overall presentation of the government's case. Why is the trial counsel requesting testimony? What is he trying to prove? The trial counsel should know what the testimony of the witness will consist of, and the witness should be familiar with the questions that will be asked, and why they are being asked. If the witness does not understand the questions, he should find out before the trial why they are being asked. When on the stand, testifying in court, this is a bad time for the witness or the trial counsel to be surprising one another with unexpected questions and answers. Appearing in court can be a very harrowing and nerve-wracking experience. If the witness is nervous, the trial counsel can help by explaining what he is proving with the testimony of the witness, and the sort of questions that will be asked (both by him and the defense on cross-examination). If the witness prefers, the trial counsel can show him the courtroom, in the event that the witness has never testified before. Always remember that the witness and the trial counsel are working toward the same objective. A coordinated effort is far more likely to meet with success.

d. The appearance of the witness should be one of cleanliness, neatness, and overall professionalism. The witness is being observed by senior NCOs and officers (court members). An MP, for example, should not act like he has never before seen the inside of a courtroom. As noted, prior coordination with the trial counsel can let the witness know what will happen at trial. The process is not complicated. The bailiff will come to the witness room and tell the witness that it is time for him to testify. The witness will then enter the courtroom, approach the witness chair, and stand, facing the trial counsel. The trial counsel will administer an oath to the witness. The witness will then be seated, and the trial counsel will ask him some questions, known as the direct examination. When the trial counsel is done, the defense will ask some questions, which is known as cross-examination. Either the military judge or the court members may also have some additional questions. The military bearing and professionalism of the witness can greatly aid, or destroy, his credibility.

2. During the trial. When the witness is taking the oath to tell the truth, he should maintain eye contact with the trial counsel who is administering the oath. As the witness testifies, he should avoid distracting mannerisms or actions, such as constantly fidgeting or shuffling papers he is holding in his lap. Such actions can distract from the substance of his testimony. In fact, the court members may be watching the witness more than they are listening to him. If the witness does bring notes or papers with

him to the witness stand, it is a good idea for him to simply place the file on the floor until he needs to use it. Obviously, he should be familiar with its contents. He should not try to memorize the file, but know where the various documents are within it. Have it indexed in some manner, so as to ensure easy access.

a. The witness should watch his use of technical terminology, as others may not understand what he is saying. He should not say things like "I issued the perpetrator an 1805 and cited him for a DWI." Instead, he should simply say "I apprehended him for driving while intoxicated." If street terminology is used, explain what it means. If terms like "dime bag," "nickel bag," "lid," etc. are used, the witness should let the court members know what is being talked about. Some of them may be unfamiliar with the terminology. If the court members do not completely understand the terms, the testimony may be useless. Such terms may be effectively used, if the witness explains the language in common, easily understood terms. The fact that the accused used such street language in a drug deal may be used by the government to rebut the claim by the accused that he never used drugs before.

b. When the witness is asked a question, the opposing attorney may object; if so, the witness should not blurt out the answer. He should wait until the military judge has ruled on the objection. There may be a very good reason why an objection was made and if the witness blurts out the answer, a mistrial could result. If the question was, indeed, improper, then the answer may be equally improper.

c. The witness should be polite and courteous. The defense counsel is only doing his job, so the witness should not take things personally. The witness should not get upset and start yelling or arguing with the defense counsel. The witness should simply answer his questions directly. The witness should not try to play games with him when answering questions. Instead of appearing "cute," the witness will appear uncooperative and evasive. If the witness does not understand the question, he should ask the defense counsel to repeat it or rephrase it. If the witness does not know the answer, he should simply say so. The witness should not guess at the answer. If the witness needs to refresh his memory by looking at his notes, he should say so. The witness may be testifying months after the investigation took place. The witness is not expected to have committed his notes to memory. The court members and the military judge will understand. An attempt of the witness to memorize his notes would be most unwise, and would most probably result in his omission of numerous critical details.

d. The witness should not volunteer information in response to questions that were not asked. There may be a good reason why the trial counsel did not want to ask a question in the first place. The witness may inadvertently disrupt the trial counsel's strategy or bring up a point the trial counsel was attempting to avoid. If the witness feels the trial counsel has omitted something important, he should wait for recess and then discuss it with the trial counsel. If necessary, the trial counsel can recall the witness.

e. The witness should be prepared for cross-examination by the defense. The defense attorney may attempt to impeach or otherwise discredit the witness. Again, this is his job, so the witness should not take it personally. The witness should not argue with the defense attorney and should avoid being sarcastic. The witness should simply answer the defense attorney's questions in the most direct manner possible. The witness should not attempt to play games with the defense attorney, as this conveys a very negative impression to the court members. The witness is testifying as a professional, so he should always act like one. If the witness feels that he cannot give a yes or no answer to a question, he should not argue with the defense attorney. He should simply state such, and let the military judge rule on the matter. The witness should not get mad if the defense counsel cuts him off in the middle of a sentence. The trial counsel will be able to ask follow-up questions, and the witness will have the opportunity to state the rest of his answer. It is a good idea for the witness to get with the trial counsel prior to trial, not only to review his own expected testimony, but also to anticipate possible cross-examination by the defense.

3. After testifying. The military judge will instruct the witness not to discuss his testimony with others (other than the attorneys in the case) until the case is concluded. The witness should not, therefore, discuss his testimony with the others waiting with him in the witness room. The witness should not discuss it with other witnesses at the office, even if he works with them. The witness should wait until the case is over. Also, after the witness testifies, he should find out if he is permanently excused. If not, the witness should not leave the courtroom area. The witness should wait until he has been permanently excused. Even then, he should always let the trial counsel know where he can be reached. The witness is subject to being recalled later in the trial. If the trial counsel cannot find him, the result may be quite embarrassing.

Overall, the key to testifying is being prepared. If the witness knows the law, knows the issues, and knows why he is testifying and for what purpose, he can approach the witness chair with confidence. If the witness is unprepared, he may be in for a most unpleasant experience. The unprepared investigator or witness may, in effect, find himself on trial.

## PART G - SUMMARY

Your ability to function as a part of the overall military justice system will be greatly helped if you have a basic knowledge of just what that system is. For a professional law enforcement officer, the courtroom should not be a strange and threatening environment. This is equally true for those who testify as commissioned officers, warrant officers, NCOs, etc. You must know what the system is, how it works, and the vital role that you play in the successful achievement of military justice.